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No. 02-

IN THE

Supreme Court of the United States

DR. JACK KEVORKIAN,

Petitioner,

v.

PEOPLE OF THE STATE OF MICHIGAN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, STATE OF MICHIGAN

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether this Court should grant Dr. Kevorkian's petition for a writ of certiorari in order to determine whether the charge of murder against him violated the Ninth and Fourteenth Amendments to the United States Constitution?

II. Whether this Court should grant Dr. Kevorkian's petition for a writ of certiorari in order to clarify whether there are any circumstances under which a prosecutor may, in the presence of the jury, comment upon an accused's decision to avail himself of his absolute constitutional right not to testify as a witness against himself?

III. Whether this Court should grant Dr. Kevorkian's petition for a writ of certiorari in order to determine whether a criminal defendant has voluntarily and knowingly waived his right to the assistance of counsel under the Sixth Amendment when such criminal defendant requests hybrid representation?

IV. Whether this Court should grant Dr. Kevorkian's petition for a writ of certiorari in order to consider the proper standard of conduct for counsel serving both as advocate and advisor before and during trial in order to ensure that an accused's constitutional Sixth Amendment right to counsel is properly protected?

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April 9, 2002 Order of the Michigan Supreme Court Denying Dr. Kevorkian's Application for Leave to Appeal, Michigan Supreme Court Docket No. 120561 (Appendix C).

STATEMENT OF JURISDICTION

The opinion of the Michigan Court of Appeals from which Petitioner, Dr. Jack Kevorkian, seeks review was issued on November 20, 2001 (Appendix A), and became final on April 9, 2002 when the Michigan Supreme Court refused to grant Dr. Kevorkian's Application for Leave to Appeal (Appendix C). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendments V, VI, VIII, IX and XIV to the United States Constitution. These Constitutional provisions are attached hereto in full as Appendix D.

STATEMENT OF THE CASE

Statement of Material Facts and Proceedings

In or around the fall of 1998, upon learning that he would be charged with a crime by the State of Michigan for committing an act protected by the Ninth and Fourteenth Amendments to the United States Constitution, Dr. Kevorkian retained attorney David Gorosh ("Gorosh") to serve as his lead defense trial counsel in connection with his impending prosecution by the State of Michigan for first degree murder, delivery of a controlled substance and assisting a suicide with respect to the death of Thomas Youk ("Youk"). R. Def.'s Br. In Supp. of Mot. for a New Trial ("New Trial Br."), Exh. A (Affidavit of Lisa Dwyer, Esq.) at 1 (Appendix I).

Lisa Dwyer, Esq. ("Dwyer"), a member of the State Bar of Michigan for approximately five years at the time, was asked by Gorosh to serve as co-counsel. *Id.* at 1. At the time, Gorosh had only three years of legal experience, and his trial experience was extremely limited. R. New Trial Br., Exh. B (Affidavit of Michael Schwartz, Esq.) at 1-2, 4-5. Gorosh had never defended a felony, much less a murder case. *Id.* at 1. Gorosh's former employer and supervisor, Michael Schwartz, Esq. ("Schwartz"), states, based on his previous experience working with Gorosh, that, when faced with a situation where Gorosh was required to subordinate his own interests to that of his client, Gorosh was either unwilling or unable to do so. *Id.* at 3, 5. Gorosh was ill-equipped to serve as lead counsel in a murder case, given his lack of experience, his inability to grasp important strategic considerations and his inability to consider the best interests of the client as noted in affidavits submitted by Gorosh's colleagues and co-counsel. New Trial Br., Exhs. A at 2, B at 2-5.

On December 9, 1998, Dr. Kevorkian was bound over on the three counts charged in the information: Count I — first degree murder, Count II — delivery of a controlled substance, and Count III — assisting suicide. December 9, 1998 Tr. at 119-124, 142; R. First Am. General Information.

These charges were brought against Dr. Kevorkian based upon a videotape that was aired on the television program "60 Minutes," which subsequently was admitted as an exhibit at the trial. March 23, 1999 Tr. Vol. II at 8-9. The videotape revealed that: (1) Thomas Youk suffered from ALS, a degenerative disease that caused him unbearable pain and suffering; (2) Thomas Youk had no control of his muscles and was terrified of choking; (3) Thomas Youk was close to death when he sought the aid of Dr. Kevorkian to alleviate his unbearable pain and suffering; and (4) in order to relieve Thomas Youk's unbearable pain and suffering, Dr. Kevorkian administered an injection to Thomas Youk, even though such injection could hasten the time of death. *Id.* The Prosecution alleged that this act constituted murder in violation of MCL 750.316, possession of a controlled substance in violation of

MCL 333.7401(2)(b) and criminal assistance to suicide in violation of MCL 750.329a. R. First Am. General Information.

Initially, Dwyer felt she would have input regarding defense strategies. New Trial Br., Exh. A at 1. However, by the time of Dr. Kevorkian's preliminary hearing on December 16, 1998, Dwyer realized her recommendations would have no effect on Gorosh's decisions. *Id.*

The relationship between Dwyer and Gorosh deteriorated rapidly, and, by January 1999, Dwyer discussed the possibility of withdrawing as co-counsel. *Id.* at 3. Gorosh persuaded Dwyer to stay on because he felt Dwyer had developed a good working relationship with Dr. Kevorkian, a relationship Gorosh himself lacked. *Id.* at 1. Nevertheless, Gorosh's control over all aspects of the case remained unyielding. *Id.* at 1-2. Gorosh withheld vital information from Dwyer. *Id.* Gorosh made public comments without consulting Dwyer, and made comments to the media against the express wishes of his client, Dr. Kevorkian. *Id.*; R. Def.'s Reply Brief in Further Supp. of Mot. for a New Trial ("New Trial Reply Br."), Exh. A (Affidavit of Dr. Kevorkian) at 1 (Appendix H). Besides ignoring the advice and input of co-counsel, Gorosh also ignored the input and wishes of his client, Dr. Kevorkian. *Id.*

As a result, on February 16, 1999, Dr. Kevorkian filed a *pro se* Motion to Dismiss based upon Constitutional grounds, which was denied by the Trial Court on February 19, 1999. R. Defendant's Motion to Dismiss; Feb. 19, 1999 Opinion and Order. Dr. Kevorkian made an emergency application for leave to appeal the February 19, 1999 Opinion and Order denying his Motion to Dismiss based upon Constitutional grounds to the Michigan Court of Appeals, which application was denied. R. Emergency Application for Leave to Appeal.

Gorosh obstinately insisted on proceeding with a pre-trial motion to quash the assisted suicide count, with the full knowledge that this could prevent his client from calling favorable witnesses at trial. New Trial Br., Exh. A at 1-2. Gorosh proceeded with this motion against the advice of co-counsel,

Dwyer, as well as several experienced attorneys, and against the express wishes of his client, Dr. Kevorkian. New Trial Br., Exhs. A at 1-2,. B at 3-4; New Trial Reply Br., Exh. A at 1. Schwartz and Geoffrey Fieger, Esq. ("Fieger")[1], experienced criminal attorneys and Gorosh's former employers, strongly advised Gorosh *not* to seek dismissal of the assisted suicide charge. New Trial Br., Exh. B at 1-4.

Despite the admonitions of Dwyer, Schwartz and Fieger, Gorosh did seek to dismiss the assisted suicide motion. New Trial Br., Exhs. A at 2, B at 3-4. At the motion hearing held on March 3, 1999, even Judge Jessica Cooper[2] was baffled by Gorosh's decision. March 3, 1999 Motion Hearing Tr. at 12 (Court). The Court asked Gorosh four times if he was certain this was how he wanted to proceed. *Id.* at 12-13. The Court stated on the record, "Let me see if I've got this straight. You want this court to dismiss the four-year felony [*i.e.*, the assisted suicide charge] and let him go to trial on murder in the first degree?" *Id.* at 12 (Court). The Court then questioned Gorosh about the prudence of this purported strategy, asking "What if they decide not to participate on assisted suicide at all and they just go for murder." *Id.* at 13. Gorosh replies, "What do you mean?" *Id.* (Gorosh). The Court continues, "What if they decide . . . that they're going to nolle pros the assisted suicide?" *Id.* (Court). The Court further questions Gorosh, "And you want them to go forward on murder in the first degree without having assisted suicide as one of those charges?" *Id.* Despite the clear suggestions by the Court, Gorosh pressed ahead with his argument to quash the assisted suicide count. *Id.* at 13-14 (Gorosh).

On March 12, 1999, the Prosecution did *nolle prosequi* the assisted suicide charge, as the Court had warned during the March 3, 1999 hearing. March 12, 1999 Tr. Dismissal of Count III at 3 (Skrzynski).

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1. Fieger and Schwartz had previously successfully defended Dr. Kevorkian against similar charges on a number of occasions.

2. Judge Cooper presided over the trial of Dr. Kevorkian in the Oakland County Circuit Court.

As the trial approached, Dr. Kevorkian wished to proceed with a hybrid defense, *i.e.*, Dr. Kevorkian wanted to have Gorosh and Dwyer serve as advocates regarding certain matters, and as advisors regarding other matters. New Trial Br., Exh. A at 2. Despite this understanding, Gorosh never discussed with Dr. Kevorkian the precise duties each party would have at trial. *Id.* At a March 19, 1999 hearing in chambers, Judge Cooper indicated that she would not permit a hybrid defense. *Id.*; March 19, 1999 Tr. at 12-14 (Court). According to Judge Cooper, Dr. Kevorkian could either represent himself at trial, or be represented by counsel, but not both. *Id.* At this point, Dr. Kevorkian agreed to allow Gorosh and Dwyer to conduct the trial. New Trial Br., Exhs. A at 2, C (Affidavit of Ruth Holmes, CDE) at 2-3.

Gorosh then decided he would essentially conduct all aspects of the trial, including jury *voir dire*, opening and closing statements and the examination of all witnesses, except the medical examiner, Dr. Dragovic. New Trial Br., Exh. A at 2.

On the weekend immediately preceding Dr. Kevorkian's trial, Gorosh did little to prepare. *Id.* at 2-3. On Saturday, March 20th, Gorosh did not make any substantive preparations for trial. *Id.* Gorosh spent most of the day arguing with a young attorney who barely had a working relationship with Dr. Kevorkian. *Id.* Dr. Kevorkian explicitly indicated that he did not want the young attorney involved with the trial. *Id.*; Aff. of Kevorkian at 1. On Sunday, March 21st, Gorosh and Dwyer were to meet with Dr. Kevorkian. New Trial Br., Exh. A at 3. At about 10:30 a.m., Gorosh and the other young attorney arrived. *Id.* at 3. Dr. Kevorkian immediately became distressed that this young attorney was present, because he had explicitly instructed Gorosh not to bring him. *Id.*; New Trial Br., Exh. C at 2; New Trial Reply Br., Exh. A at 1. An hour-long argument ensued wherein Dr. Kevorkian informed Gorosh that he no longer trusted him. New Trial Br., Exhs. A at 3, C at 2-3; New Trial Reply Br., Exh. A at 1.

Dr. Kevorkian told Gorosh in no uncertain terms that he would represent himself unless Dwyer could represent him at trial. New Trial Br., Exhs. A at 3, C at 2-3. Gorosh was adamant

that Dwyer could not do so. New Trial Br., Exh. A at 3. Dwyer discussed this matter with Gorosh, and Gorosh reiterated that she could not conduct the trial because he was lead counsel, and it would damage his reputation if Dwyer replaced him. *Id.* For the same reason, Gorosh refused Dwyer's suggestion that she conduct the substantive aspects of the trial in the beginning, with the hope that the relationship between Gorosh and Dr. Kevorkian would improve once trial commenced. *Id.*

Because Gorosh stated that he would not permit Dwyer to act as trial counsel, Dwyer expressed reservations when Dr. Kevorkian again asked her to represent him at trial. *Id.* Dwyer indicated she was concerned about conducting the trial alone because terminating Gorosh would cause a great deal of publicity. *Id.* In addition, Dwyer indicated that she felt awkward because Gorosh had asked her to assist as co-counsel. *Id.* Despite knowing that representing himself could be detrimental to his case, Dr. Kevorkian decided he would rather represent himself than be represented by Gorosh, whom he did not trust. *Id.*

Dwyer discussed the breakdown of the attorney-client relationship with Gorosh on the way to Court on March 22, 1999, the day of trial. *Id.* Dwyer suggested that Gorosh discuss the situation with Judge Cooper, but Gorosh refused. *Id.*

Although the Trial Court purportedly denied any form of hybrid representation, the Trial Court insisted that Gorosh stay on to provide advice and consultation to Dr. Kevorkian, and Dr. Kevorkian agreed to this arrangement. March 22, 1999 Tr. Vol. I at 10-12; March 23, 1999 Tr. Vol. II at 95-96, 101, 135, 137, 145 (Court); March 23, 1999 Tr. In Chambers Proceedings at 13, 25-26 (Court). In addition to his actions as advocate before trial, Gorosh continued to act as an advocate at times, as well as an advisor, for Dr. Kevorkian during trial. New Trial Br., Exh. A at 2; March 23, 1999 Tr. Vol II at 95-96, 98 (Court).

Throughout the trial, Gorosh and Dwyer sat at the counsel table with Dr. Kevorkian. New Trial Br., Exh. A at 4; March 22, 1999 Tr. Vol. I at 10-11, 247. Dr. Kevorkian was under the impression that he was represented by counsel throughout the

trial. March 22, 1999 Tr. Vol. I at 268. Dr. Kevorkian understood his role to be that of a mouthpiece to present information prepared by his attorneys. March 23, 1999 Tr. Vol. II at 137; March 23, 1999 Tr. In Chambers Proceedings at 12-13, 25-26.

After it became clear to Gorosh that he would not be conducting the trial, he became distant and at times withheld legal advice, in an attempt to frustrate Dr. Kevorkian so that he would turn over all aspects of the case to Gorosh out of frustration and desperation. New Trial Br., Exh. C at 3-4. As the trial progressed, Gorosh became far more interested in making comments to the media than in defending his client. New Trial Br., Exhs. A at 1-4, C at 4; New Trial Reply Br., Exh. A at 1. Gorosh's priorities became distorted, detrimentally affecting Dr. Kevorkian's defense and best interests. New Trial Br., Exh. C at 4; New Trial Reply Br., Exh. A at 1.

Furthermore, during the trial, Gorosh openly displayed contempt and ridicule for Dr. Kevorkian, and the defense Dr. Kevorkian was attempting to present. New Trial Br., Exhs. A at 4, C at 3-4. Throughout the trial, Gorosh made comments under his breath, rolled his eyes, sighed deeply, put his head in his hands, smirked and appeared to share the Trial Court's discomfort during difficult points, rather than assisting and supporting his client, Dr. Kevorkian. New Trial Br., Exh. A at 4. Gorosh sat between Dwyer and Dr. Kevorkian, making it impossible for Dwyer to consult with Dr. Kevorkian during trial even though Dr. Kevorkian so desired. *Id.*; New Trial Reply Br., Exh. A at 1. Ruth Holmes, CDE ("Holmes"), a jury consultant and handwriting and document examiner versed in evaluating body language, was retained by Dr. Kevorkian as a jury consultant to aid in his defense. New Trial Br., Exh. C at 1. Holmes advised Gorosh that his behavior during trial would have a negative effect on the presentation of Dr. Kevorkian's defense. *Id.* at 4.

During the times that Gorosh acted as an advocate, as well as the times he acted as an advisor, Gorosh provided very little substantive advice or consultation to Dr. Kevorkian with respect to trial preparation, and virtually no advice during the actual trial

proceedings themselves, although Dr. Kevorkian sought and needed such advice. *Id.*; New Trial Reply Br., Exh. A at 1. Gorosh did not respond to Dr. Kevorkian's requests for information, despite Dr. Kevorkian's repeated inquiries. New Trial Reply Br., Exh. A at 1. Gorosh rarely returned Dr. Kevorkian's telephone calls regarding the case, and never did so in a timely manner. *Id.* As the trial progressed, Dr. Kevorkian developed further distrust of Gorosh, and began to feel that Gorosh was incapable of providing adequate counsel. *Id.* Dr. Kevorkian became shocked at Gorosh's unscrupulous and insolent behavior. *Id.*

Dwyer requested that Gorosh instruct Dr. Kevorkian to object to numerous inappropriate references made by the Prosecutor during his closing and rebuttal arguments, which references blatantly violated Dr. Kevorkian's Fifth Amendment right not to testify. New Trial Br., Exh. A at 4-5. Nevertheless, Gorosh only advised Dr. Kevorkian to object on one occasion, involving an improper comment unrelated to Dr. Kevorkian's right not to testify. *Id.*; March 25, 1999 Tr. Vol. III at 65 (Dr. Kevorkian).

When the jury trial was concluded, Dr. Kevorkian was convicted of second degree murder and delivery of a controlled substance. March 26, 1999 Tr. Vol. IV at 6 (Jury Foreman). The Michigan Department of Corrections ("MDC") recommended a downward departure from the Michigan Sentencing Guidelines in its April 8, 1999 Sentence Recommendation to the Trial Court. R. MDC Sentence Recommendation. The Sentencing Report indicates that the facts and circumstances of this case are unusual inasmuch as Thomas Youk was gravely ill and sought Dr. Kevorkian's assistance, among other mitigating circumstances. *Id.* at 2. The Sentencing Report further states that these facts may mitigate Dr. Kevorkian's culpability, and are not adequately taken into account by the sentencing guidelines. *Id.*

Despite the downward departure from the Michigan Sentencing Guidelines recommended by the MDC, the Trial Court did not deviate from the standard sentencing guidelines, and instead sentenced Dr. Kevorkian to ten to twenty-five years

in prison on the second degree murder conviction, and three to seven years in prison for the delivery of a controlled substance. April 13, 1999 Tr. at 38 (Court).

Dr. Kevorkian filed a timely Motion for a New Trial on May 21, 1999. R. Def.'s Mot. For a New Trial. The Motion for a New Trial was based on affidavits from and conversations with members of the defense team who explained the facts and circumstances of Gorosh's representation of Dr. Kevorkian. R. New Trial Br.; R. New Trial Reply Br. The Trial Court summarily denied Dr. Kevorkian's Motion, as well as his request for a *Ginther* hearing[3], without allowing argument, in an Opinion dated July 15, 1999. R. July 15, 1999 Opinion and Order.

Dr. Kevorkian timely filed his Claim of Appeal in the Michigan Court of Appeals on August 23, 1999 raising several Constitutional issues. R. Claim of Appeal. Dr. Kevorkian filed his Appellate Brief on November 11, 1999. R. Dr. Kevorkian's Appellate Br. (Appendix F-G).

On November 20, 2001, the Court of Appeals rejected Dr. Kevorkian's request for reversal and/or a new trial based upon the Constitutional arguments he asserted. R. Nov. 20, 2001 Opinion of the Michigan Court of Appeals (Appendix A).

Dr. Kevorkian made timely application for leave to appeal the erroneous November 20, 2001 Order of the Michigan Court of Appeals to the Michigan Supreme Court (the "Application") (Appendix E). On April 9, 2002, the Michigan Supreme denied Dr. Kevorkian's Application. R. April 9, 2002 Order of the Michigan Supreme Court (Appendix C).

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3. Michigan law requires a *Ginther* hearing where the effectiveness of counsel is called into question. *See, People* v. *Ginther*, 390 Mich. 436, 442-443, 212 N.W.2d 922 (1973).

REASONS FOR GRANTING THE WRIT

I. The Instant Petition Should Be Granted Because The Charges Against Dr. Kevorkian Must Be Dismissed Based On The Ninth And Fourteenth Amendments To The United States Constitution.

A. The Michigan Court of Appeals Erroneously Held that the Michigan Legislature Should Interpret and Enforce the United States Constitution Instead of the Courts.

The Michigan Court of Appeals erroneously ruled that it is *not* up to Courts, but up to the legislature, to determine whether there is a Constitutionally protected right to be free from unbearable pain and suffering, and thereby the Michigan Courts have shirked their Constitutional duty to ensure that the United States Constitution is upheld. The decision of the Michigan Court of Appeals is clearly erroneous and in violation of the United States Constitution inasmuch as it is up to the Courts (and only the Courts) to interpret and enforce the Constitution. Indeed, this Court, reaffirming its historic holding in *Marbury* v. *Madison*, 5 U.S. 137 (1803), made nearly two centuries ago, confirmed that "it is emphatically the province and duty of the judicial department to say what the law is." *United States* v. *Morrison*, 529 U.S. 598, 617 (2000) (citation omitted).

The Michigan Court of Appeals' assertion that the issue of whether there is a Constitutionally protected right to be free from unbearable pain and suffering should be left for the legislature is not only erroneous, but also merely begs the question. If there is such a Constitutionally protected right, *there is no question for the legislature at all because the government can not abridge a Constitutionally protected right*[4]. It is the duty and obligation of the courts to ensure that Constitutionally protected rights are not inappropriately infringed upon by the government. *Id.*

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4. Of course, the legislature could regulate the assertion of the right within Constitutionally boundaries (*i.e.*, certain legislative restrictions on free speech are permissible, while others are not).

Instead of addressing this issue, the Michigan Court of Appeals inexplicably held that "courts are simply unsuited" to "assess the quality of human life and determine, as a matter of law, that putting an end to suffering is justifiable in one case while, in another, it is not." However, this question was simply not before the Michigan Court of Appeals. The simple question before the Court was: Is there a Constitutional right to be free from unbearable pain and suffering? The courts should not answer that it is not up to them to decide whether the Constitution provides for any such right simply in order to avoid difficult questions which could follow. Indeed, courts are often called upon to draw lines and determine what specific actions are, or are not, covered by Constitutionally protected rights. If, as this Court has suggested, there is a right to be free from unbearable pain and suffering, determining when and how this right can be invoked is no different than determining what kinds of speech are protected by the First Amendment.

B. The Right to Be Free From Unbearable Pain and Suffering is Deeply Rooted in American Jurisprudence and is Constitutionally Protected.

The right to be free from unbearable and irremediable pain and suffering is deeply rooted in this nation's history and in the United States Constitution itself.

First, the United States Constitution guarantees that a person shall not be deprived of liberty. U.S. Const., Am. XIV; Const. 1963 Art. I, § 17.

Second, the Fourteenth Amendment to the United States Constitution states, in pertinent part, "No state . . . shall deprive any person of life, liberty, or property, without due process of law." U.S. Const., Am. XIV.

Third, the Ninth Amendment to the United States Constitution states that certain *unenumerated rights are reserved to the People*, and are not to be abridged by the government. U.S. Const., Am. IX.

Fourth, traditional Constitutional interpretation requires that every word has its due force and meaning. *Ogden* v. *Saunders*, 25 U.S. (12 Wheat) 213 (1827).

Thus, logically, there must be *some* unenumerated rights protected by the Ninth Amendment to the Constitution in order that this Amendment is not mere surplusage. Whatever these unenumerated rights are, they are expressly reserved to the People and can not be abridged by the government. U.S. Const., Am. IX. Therefore, if the Ninth Amendment is to have any substantive meaning, as it must under well-recognized rules of Constitutional construction, Dr. Kevorkian asserts that a right to be free from inexorable pain and suffering must be among the unenumerated rights protected by the Ninth Amendment. *Id.* In order for such unenumerated rights to have any practical effect, they must first be recognized by the courts, as Dr. Kevorkian requests herein.

In the alternative, and for the very same reasons, the right to be free from unbearable pain and suffering may also be encompassed in the "liberty" guaranteed by the Fourteenth Amendment. Indeed, this Court has broadly construed the right to liberty guaranteed by the Fourteenth Amendment to include various rights, including the right to obtain (or decline) certain medical procedures. For instance, this Court recognized that the right to privacy is part of the "liberty" protected by the Fourteenth Amendment. *Roe* v. *Wade*, 410 U.S. 113 (1973). In *Roe*, the right to privacy inherent in the "liberty" protected by the Fourteenth Amendment was held to guarantee a woman's right to obtain the medical procedure of abortion prior to viability[5].

Likewise, the Constitutional right at issue here is the intensely personal and private right of a patient to be free from intolerable and irremediable suffering due to a terminal medical

5. It is worth noting that many of the same "slippery slope" fears posited by the Michigan Court of Appeals were (and still are) raised in opposition to this Court's *Roe* decision. Nonetheless, this Court recognized that certain intensely personal decisions, though possibly subject to abuse, are nonetheless Constitutionally protected because certain personal rights are simply not subject to government intrusion.

condition. This Court and almost every state have implicitly acknowledged this right, supporting the view that the administration of aggressive pain-killing drugs is acceptable, even if this may hasten death, because *no person can be made to suffer unbearably*. *See, e.g., Vacco* v. *Quill*, 521 U.S. 793 (1997).

The necessary and direct corollary of this position is that a person should not be forced to suffer unbearably, and such pain must be alleviated, *even if such alleviation would hasten death*. *Id.* In some cases, such as *Vacco*, this right was assured simply by means of a doctor providing sufficient pain medication, even though the administration of such pain medication could hasten death. *Id.* However, in other situations, such as the case at bar, the only medical method for ending the interminable suffering of patients such as Thomas Youk is to provide them with an injection to permanently end their suffering, though such injection will hasten death.

In *Washington* v. *Glucksberg*, 521 U.S. 702 (1997), this Court held that there is no Constitutional right to physician-assisted suicide, but premised its holding on the fact that *a patient is not restricted from receiving adequate pain medication to alleviate his/her suffering, even if the receipt of such medication hastens the patient's death*[6].

The Michigan Court of Appeals dramatically misread this Court's opinion in *Glucksberg*, and the separate opinions of the Justices in connection therewith. Specifically, Justice O'Connor made clear that it was not necessary for the Court in *Glucksberg* to reach the question of "whether a mentally competent person who is experiencing *great suffering* has a constitutionally cognizable interest in controlling the circumstances of his or her imminent death." *Id.* at 737 (O'Connor, J., concurring) (emphasis added). Thus, this Court, in *Glucksberg* and *Vacco*, did *not* reach the question presented here, because, as the

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6. In any event, in the case at bar, Dr. Kevorkian was *not* convicted of assisting a suicide, but was convicted of murder, even though the State failed to prove the requisite elements thereof beyond a reasonable doubt.

Michigan Court of Appeals recognized, it was clear that the dying patients in those cases, unlike Thomas Youk, had access to adequate medication sufficient to relieve their pain such that they did not suffer unbearably. *Id.* at 737-738 (the "dying patients [involved in *Glucksberg*] can obtain palliative care, even when doing so would hasten their deaths.")

Nonetheless, Justice Breyer, in *Glucksberg*, acknowledged that the right to be free from unbearable pain would be *central* to any Constitutional claim of a right to hasten inevitable death, and that if such a situation were presented, this Court might have reason to revisit its conclusions, because, where unbearable pain can *not* be relieved, a different issue is presented. *Glucksberg*, 512 U.S. at 792 (Breyer, J., concurring). Justice Breyer acknowledged that medical care allows for the alleviation of pain in all but a few individuals (such as Thomas Youk). *Id.* at 791-792. Justice Breyer recognized that the laws at issue in *Glucksberg* did not "force a dying person to undergo" unbearable pain, and therefore the *Glucksberg* case did not implicate the issue of "unavoidable physical pain." *Id.* However, for individuals suffering unbearable physical pain, Justice Breyer recognized that the only solution is total sedation, which can result in a coma. *Id.* Such a result would lead to the situation present in *Cruzan* v. *Director, Missouri Dept. of Health*, 497 U.S. 261 (1990), wherein this Court recognized the right of a comatose person on life support to remove such life-sustaining medical equipment, even though the removal of the life support equipment would hasten death[7]. It would be infinitely more sensible to recognize the Constitutional right of those suffering unbearable pain *that can not be alleviated by medical means short of total sedation leading to coma* to take any and all steps necessary to alleviate this pain, without enduring the further mental and physical suffering of a coma, even though such steps may lead to or hasten death.

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7. Indeed, the distinction between removing life support, which, by definition, will lead to death, and administering pain medication that will relieve pain but can lead to death, may be one without a difference.

Similarly, Justice Stevens, in *Glucksberg*, indicated that, where palliative care was inadequate to eliminate pain and suffering, the state's interest in preventing potential abuse and mistake would be only minimally implicated, and he refused to "foreclose the possibility that an individual plaintiff seeking to hasten her own death, *or a doctor whose assistance was sought*, could prevail in a more particularized challenge." *Glucksberg*, 521 U.S. at 750 (Stevens, J., concurring) (emphasis added). Justice Stevens noted that state concerns against abuse will *not* always outweigh the individual liberty interests of a particular patient. *Id.* at 749-750. Justice Stevens further stated that, "*avoiding intolerable pain and the indignity of living one's final days incapacitated and in agony is certainly at the heart of the liberty* . . . to define one's own concept of existence." *Id.* at 745 (citation omitted, emphasis added). Justice Stevens unequivocally stated that "some intrusions [by the government] on the right to decide how death will be encountered are also *intolerable*." *Id.* (emphasis added). Justice Stevens finally stated that "a doctor who prescribes lethal medication does not necessarily intend the patient's death — rather that doctor may seek simply to ease the patient's suffering *and to comply with her wishes*." *Id.* at 751 (emphasis added). Justice Stevens thus recognized that, in the case of a mentally competent person, it is a doctor's overriding duty to comply with that person's wishes, and an intent to ease unbearable suffering by the only medical means available is simply *not* the same as an intent to cause death, even though death might result.

Furthermore, Justice Souter, in *Glucksberg*, suggested that the Fourteenth Amendment's guarantee of liberty might be the "only possible means of preserving a dying patient's dignity and alleviating her intolerable suffering." *Glucksberg*, 521 U.S. at 752 (Souter, J., concurring)[8].

8. The Michigan Court of Appeals misconstrued Justice Souter's opinion as well, focusing on the issue of assisted suicide, which is not at issue here. Justice Souter clearly acknowledged that a patient had a right to "bodily integrity" and that a patient had a right to exercise his autonomy by choosing death over being drugged into a stupor or forced to suffer unbearable pain. *Glucksberg*, 521 U.S. at 778-779 (Souter, J., concurring)

Thus, this Honorable Court has interpreted the Fourteenth Amendment's guarantee of liberty to apply to various privacy rights, including those related to personal and private medical procedures, and Justices of this Court have indicated that the guarantee of liberty may very well apply to the right to be free from unbearable pain and suffering which can not be relieved by palliative care. *See, e.g., Roe, supra.* The holdings in *Glucksberg* and *Vacco* that the right of the terminally ill to hasten inevitable death was not a fundamental right for Constitutional purposes was predicated on the fact that the terminally ill person was being provided adequate pain medication and was *not* undergoing unbearable suffering. Under *Glucksberg*, a terminally ill person does have a Constitutional right to receive adequate pain medication, even if this has the effect of hastening their inevitable death.

Specifically, the right to be free from unbearable pain is deeply rooted in the text of the Constitution itself. The Eighth Amendment to the United States Constitution strictly prohibits cruel and unusual punishment. U.S. Const., Am. VIII. This Court has long recognized that the policy against cruel and unusual punishment embodied in the Eighth Amendment is firmly established in the Anglo-American tradition of criminal justice. *Trop* v. *Dulles*, 356 U.S. 86, 99-100 (1958).

Furthermore, the Eighth Amendment's prohibition against cruel and unusual punishment applies not only to the punishment of those convicted of a crime, but also to *any governmental action that amounts to inhumane treatment. Id.* at 100-101. Thus, *the underlying values of the Eighth Amendment clearly represent a fundamental policy against forcing any citizen to endure unbearable pain for any reason. Id.*

Tellingly, this Court has held that the Eighth Amendment does *not* prohibit the punishment of death, but *does* prohibit the imposition of death in any manner which causes unbearable suffering, such as burning at the stake, crucifixion or breaking on the wheel. *In re Kemmler*, 136 U.S. 436, 446 (1890). In *Kemmler*, this Court noted that the punishment of death is

not in itself "cruel" within the meaning of the Eighth Amendment inasmuch as the prohibition against cruel and unusual punishment set forth in the Eighth Amendment "implies something more inhuman and barbarous, something more than the mere extinguishment of life." *Id.* Thus, this Court has recognized that there are worse fates than death, and, pursuant to the Eighth Amendment, the government can not in any way force citizens to suffer some of those fates (*e.g.*, suffering unbearable and irremediable pain and suffering) *under any circumstances. Id.*

Therefore, while the Eighth Amendment's prohibition against cruel and unusual punishment applies only against the government's imposition of such punishment, the *fundamental values* embodied in the Eighth Amendment make it clear that the Constitution itself abhors the concept of citizens being subjected to unbearable pain and suffering *for any reason*[9]. Furthermore, the Eighth Amendment recognizes that unending, torturous pain and suffering is *worse than death* inasmuch as torture is prohibited, but the humane imposition of death is not. *Kemmler*, 136 U.S. at 446.

C. This is the Case to Consider the Possibility that Any Law Which Effectively Forces a Person to Suffer Unbearably Is Unconstitutional on its Face.

The case at bar presents the type of particularized challenge that this Court has suggested it would consider inasmuch as it involves a patient who was enduring unbearable pain and suffering which could not be alleviated by palliative care. *Glucksberg*, 521 U.S. at 750 (Stevens, J., concurring). Furthermore, the physician who aided the patient has been tried and convicted. It is well settled that Dr. Kevorkian has standing

9. Specifically, "deliberate indifference to the serious medical needs of prisoners" has been held by this Court to be in violation of the Eighth Amendment. *Estelle* v. *Gamble*, 429 U.S. 97, 104-105 (1976). *See also, Marinez* v. *Mancusi*, 443 F.3d 921, 923 (2d Cir. 1970) (prisoner deprived of pain killers and forced by prison officials to stand, against doctor's orders, following a serious leg operation did raise colorable claim of violation of Eighth Amendment).

to assert Thomas Youk's Constitutional rights to be free from intolerable pain. *See, e.g., Birth Control Ctr., Inc.* v. *Reizen*, 743 F.2d 352, 360 (6th Cir. 1984) (physicians performing first trimester abortions have standing to assert their patients' due process rights). In fact, this Court has recognized the possibility that an individual who provides assistance to a patient suffering interminably could prevail on a Constitutional challenge. *Id.*

For Thomas Youk, a person in the end stages of a fatal and unforgiving disease, pain medication simply could no longer relieve his unbearable suffering. This is clear from the videotapes introduced into evidence. The only medical relief for Thomas Youk's condition was the relief he sought from Dr. Kevorkian. The injection Dr. Kevorkian gave to Thomas Youk was the only effective medical way to alleviate Thomas Youk's unbearable suffering, and, as Justice Stevens recognized, Dr. Kevorkian's intent in providing such medication was to ease this unbearable suffering, not to cause death. It is simply unconstitutional to deem such conduct "murder."

II. The Instant Petition Should Be Granted Because The Prosecutor's Impermissible Comments About Dr. Kevorkian's Decision Not To Testify Deprived Dr. Kevorkian Of His Fifth Amendment Rights.

The Fifth Amendment to the Constitution states, "No person . . . shall be compelled to be a witness against himself." U.S. Const. Am. V. This provision was made applicable to the states via the Fourteenth Amendment by this Court's decision in *Malloy* v. *Hogan*, 378 U.S. 1, 6 (1964).

In *Griffin* v. *California*, 380 U.S. 609, 614 n.5 (1965), this Court held that the prosecution may *not* comment on the accused's silence, expanding on the general rule set forth in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), that the prosecution may not use at trial the fact that the accused claimed his privilege against self-incrimination in the face of accusation. Any comment by the prosecution on the refusal of the accused to

testify is a remnant of the inquisitorial system of criminal justice, outlawed by the Fifth Amendment. *Griffin*, 380 U.S. at 614. Permitting such comment by the prosecution amounts to an impermissible penalty imposed by courts on the exercise of a Constitutional privilege. *Id.* Whether a jury may draw a negative inference *on its own* from the accused's failure to testify is vastly different than the court solemnizing such silence into evidence against the accused, and such court action is prohibited by the Constitution. *Id.*

Furthermore, this Court, in construing the right of a person to remain silent has stated flatly that a person may "suffer *no penalty* . . . for such silence." *Malloy*, 378 U.S. at 8 (emphasis added). *Accord*, *Spevack* v. *Klein*, 385 U.S. 511, 514 (1966). A penalty for silence includes the "imposition of *any sanction* which makes assertion of the Fifth Amendment privilege costly." *Spevack*, 385 U.S. at 515 (citation omitted, emphasis added). This Court has cautioned that even the *slightest* encroachments on Constitutional rights are prohibited, and the privilege against self-incrimination is to be construed *liberally*. *Id.* at 515-516. *See also*, *Coppola* v. *Powell*, 878 F.2d 1562, 1566 (1st Cir. 1989) (the privilege against self-incrimination should be given liberal application). *See also*, *Spevack*, 385 U.S. at 515 (Constitutional provisions for the security of person and property should be liberally construed). Thus, courts must guard against even the subtlest implications by the prosecution alluding to the accused's decision to exercise his absolute Fifth Amendment right. *Id.*

In accord with this Court's holding in *Griffin*, the Sixth Circuit has explained its criteria for examining indirect references by a prosecutor to a defendant's failure to testify. The reviewing court must examine four factors: (1) were the comments intended to reflect on the accused's silence or are they of such a character that the jury would naturally and necessarily take them as such; (2) were the remarks isolated or extensive; (3) was the evidence of guilt otherwise overwhelming; and (4) what curative instructions were given and when. *Lent v. Wells*, 861 F.2d 972, 975 (6th Cir. 1988). The statements must be viewed in context, "not singled out and standing alone,"

and in the aggregate. *Id.* at 976; *Berryman* v. *Colbert*, 387 F. Supp. 378, 380 (E.D. Mich. 1974).

If the reviewing court determines that there was error, it must then determine if the error was harmless. *Lent*, 861 F.2d at 975.

> Harmless error, in the context of the violation of a Constitutional Right of a defendant is an *extremely narrow* standard permitting the state to avoid retrial of a defendant only when it can *demonstrate beyond a reasonable doubt that the error did not contribute in any way to the conviction of the defendant.* *Id.* at 977, *citing, Chapman* v. *California*, 386 U.S. 18 (1967) (emphasis added).

This Court has held that the reviewing court must make a determination whether, absent the prosecutor's allusion to the accused's failure to testify, it is clear *beyond a reasonable doubt* that the jury would have returned a verdict of guilty. *United States* v. *Hastings*, 461 U.S. 499, 510-511 (1982). Indeed, in *Lent*, although the Sixth Circuit agreed the case was certainly strong enough to find a defendant guilty, it held that the state had still not demonstrated *beyond a reasonable doubt* that the Constitutional error was harmless, as required by this Court's holding in *Hastings*, *supra*. *Lent*, 861 F.2d at 977.

A. The Michigan Court of Appeals Erroneously Refused to Apply the Precedent of this Court On the Untenable Basis that Such Precedent Did Not Apply Because Dr. Kevorkian Purportedly Proceeded Pro Se.

Although the Michigan Court of Appeals acknowledged the clear precedent affirming that *no comment* may be made with respect to a defendant's decision to assert his Constitutional right not to testify, it erroneously asserted, *without support*, that such precedent is inapplicable where a defendant proceeds *in propria persona*[10].

10. For the reasons fully set forth below, Dr. Kevorkian did not decide to proceed *in propria persona*. Nevertheless, even assuming *arguendo* that he had, this has no effect on the obligation of the Court to fully enforce his Fifth Amendment rights.

No decision of this Court, or any Circuit Court of Appeals, has held that the Fifth Amendment right against self-incrimination is *in any way diminished* when a defendant chooses to exercise his Constitutional right to represent himself. The Michigan Court of Appeals relied upon an ill-conceived decision of the Michigan Supreme Court, *People* v. *Marcus Jones*, 442 Mich. 893, 499 N.W.2d 344 (1993), to support its erroneous assertion that a Prosecutor, in making objections, may comment upon the accused's right not to testify. In *Marcus Jones*, the Michigan Supreme Court refused to grant defendant a new trial where defendant was warned by the trial court to cease interrupting the prosecution's closing. The trial court warned defendant that he "had an opportunity to testify." *Id.* at 894. The Michigan Supreme Court determined that the trial court's response was a proper, though awkward, response to defendant's interruptions. *Id.*

In the case at bar, it was the Prosecutor who repeatedly interrupted Dr. Kevorkian. The Prosecutor, who is (or should be) well-versed with respect to a defendant's Fifth Amendment right, could have simply objected without explanation, or sought a bench conference out of the presence of the jury. Instead, on more than five occasions, the Prosecutor used his objections as an excuse to interject, in front of the jury, that Dr. Kevorkian had chosen to exercise his Constitutional right not to testify.

In any event, even if *Marcus Jones* stands for the proposition asserted by the Michigan Court of Appeals, this holding would violate the United States Constitution and contradict previous holdings of this Court. Thus, any interpretation of the *Marcus Jones* decision that would permit an encroachment upon an accused's Fifth Amendment right not to testify, as suggested by the Michigan Court of Appeals, is invalid inasmuch as it would violate the Federal Constitution.

In fact, the Prosecution violated Dr. Kevorkian's Constitutional rights when the Prosecutor made comments during the trial which were clearly of such a character that the jury would naturally and reasonably take them as a reference to

Dr. Kevorkian's Constitutionally protected decision not to testify. Whether the jury would naturally construe the comments to reflect on Dr. Kevorkian's failure to testify requires a probing analysis of the context of the comments, and the likely effects of any curative instruction given by the Trial Court. *See Lent*, 861 F.2d at 977.

By closely examining the comments made by the Prosecutor, it is clear that the jury would understand that the Prosecutor was in fact repeatedly referring to Dr. Kevorkian's failure to testify. During Dr. Kevorkian's closing argument, the Prosecutor made at least four comments in a very short period of time, referring to Dr. Kevorkian's failure to testify. The Prosecutor said, "*He can't testify now. He can't tell the facts now.*" March 25, 1999 Tr. Vol. III at 50 (emphasis added). The Prosecutor objected again a short time later saying, "He cannot put facts before the jury *which have not been proven before through testimony or other evidence. He cannot testify now.*" *Id.* at 53 (emphasis added). The Prosecutor continued to state "[the defendant] *could have gotten on — you know, he didn't.*" *Id.* at 54 (emphasis added). Although the Prosecutor did not use the word "stand" everyone in the courtroom, especially the jury, was able to fill in the blank with the word "stand" since that is the natural and expected finish of the Prosecutor's sentence. Any juror was able to extrapolate this especially in light of the clear context of the Prosecutor's comments that Dr. Kevorkian "cannot testify now," but "could have" and "didn't."

Finally, the Prosecutor went on to object saying, "*He's now testifying.* He's putting new facts before the jury. He can't do that." *Id.* (emphasis supplied). In addition to these inappropriate comments, the Prosecutor also pointed out during his closing that "[Dr. Kevorkian] turns the videotape off and he goes back to work apparently. We don't know exactly what he does. And why does he turn it off? Why doesn't he keep the whole thing on all the time?" March 25, 1999 Tr. Vol. III at 32 (Skrzynski). This too is an indirect but clear reference to the lack of answers due to Dr. Kevorkian's Constitutionally protected decision not to testify.

When viewed in context, the Prosecutor's remarks were extensive. The Prosecutor hammered the point home to the jurors that Dr. Kevorkian had not testified, although this is his Constitutional right. Because of the short period of time in which all the comments were made (between pages 32-33 and then between pages 50-54 of the March 25, 1999 trial transcript), the message was crystal clear. Furthermore, these comments were made during closing argument, and were some of the last things jurors heard before retiring to deliberate. Simply put, it is reversible error to specifically refer to the failure of defendant to take the stand, and Michigan law, as well as the precedent of this Court, unequivocally recognize this. *Griffin*, 380 U.S. at 614 n.5; *People* v. *Alexander*, 17 Mich. App. 497, 169 N.W.2d 652 (1969).

B. The Michigan Court of Appeals Failed to Apply the Proper Standard of Review for a Constitutional Issue, and Compounded this Mistake by Reviewing the Constitutional Issue Only for Plain Error.

The Michigan Court of Appeals erroneously held that Dr. Kevorkian failed to preserve this issue for review, and thus reviewed it only for plain error which affected defendant's substantial rights. On the contrary, Dr. Kevorkian properly preserved this issue for review by raising it in the Trial Court in his Motion for a Mistrial. March 26, 1999 A.M. Tr. of In Chambers Proceedings at 3-13. In any event, any failure to preserve this issue for review prior to said Motion for Mistrial is the fault of Gorosh, and further evidences his failure to provide effective assistance, as fully set forth below. Indeed, although Gorosh sat at counsel table while the Prosecutor made the egregious comments about Dr. Kevorkian's right not to testify, *Gorosh failed to object or to instruct Dr. Kevorkian to object.* Therefore, in the interests of justice, this Court should consider this issue under the standards set forth above[11].

11. Even if this Court chooses to employ the "plain error" standard, the Prosecutor's comments clearly affected Dr. Kevorkian's substantial Constitutional right not to testify and therefore such comments do in fact amount to plain error. *See United States* v. *Olano*, 507 U.S. 725 (1993).

III. The Instant Petition Should Be Granted Because This Court Should Determine Whether A Request For Hybrid Representation Constitutes A Waiver Of The Right To Assistance Of Counsel Under The Sixth Amendment, And, When Such An Arrangement Exists In Substance, What Standard Of Conduct Applies To The Role Of Advisory Counsel During A Criminal Trial.

A. The Question of Whether Dr. Kevorkian Waived His Sixth Amendment Right to Counsel Is of Constitutional Significance.

Although the Michigan Court of Appeals' Opinion emphasized the fact that the Trial Court asked Dr. Kevorkian if he was certain he wanted to proceed *pro se*, and claims that Dr. Kevorkian knowingly and voluntarily waived his right to counsel, this simply can not be the case. At the very times that the Trial Court was asking Dr. Kevorkian if he was certain he wanted to waive his right to counsel, it was *allowing* and *encouraging* Dr. Kevorkian to consult with, and have the aid of, counsel in the courtroom at counsel table and on written briefs. March 22, 1999 Tr. Vol. I at 8-10; March 23, 1999 Tr. of In Chambers Proceedings at 25-26; March 25, 1999 Tr. Vol. III at 3. In fact, the record makes clear that it was Dr. Kevorkian's wish to use a system of hybrid representation, a plan the Trial Court refused to properly consider, *although it permitted this approach in practice*[12]. March 19, 1999 Tr. at 12-14. The facts show that Dr. Kevorkian did *not* in fact, and never

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12. The Trial Court misconstrued the applicable law, and determined that a court can not even consider a request for hybrid representation. But, under Michigan law, as well as Federal law, hybrid representation can be and has been allowed in appropriate situations. *See, e.g., People* v. *Ramsey*, 89 Mich. App. 22, 198 N.W.2d 811 (1972); *People* v. *Griffen*, 36 Mich. App. 368, 372, 194 N.W.2d 104 (1971); *United States* v. *Hill*, 526 F.2d 1019, 1024 (10th Cir. 1975); *United States* v. *Tutino*, 883 F.3d 60, 67 (2d Cir. 1989), *cert. denied*, 493 U.S. 1081 (1990).

intended to, represent himself without relying upon assistance from counsel, and the Trial Court *permitted and encouraged this arrangement.*

Indeed, in *Fowler* v. *Collins*, 253 F.3d 244, 246-247 (6th Cir. 2001), the Sixth Circuit reviewed defendant's application for habeas corpus relief on the basis that he had not given a knowing and intelligent waiver of his right to counsel. The Sixth Circuit granted the application finding that the Michigan Court's determination that defendant's waiver was knowing and intelligent was an *unreasonable* application of established precedent regarding knowing and intelligent waiver. *Id.* at 250. The Sixth Circuit noted that, in order "[t]o ensure that a defendant's waiver is made with eyes wide open, a judge must *thoroughly investigate* the circumstances under which the waiver is made." *Id.* at 249 (emphasis added). The Sixth Circuit further noted that "[t]he fact that an accused may tell [the judge] that he is informed of his right to counsel and desires to waive this right does *not* automatically end the judge's responsibility." *Id.* at 250 (emphasis added). The Sixth Circuit further stated that the failure of the Michigan trial court to have defendant sign a *written waiver*, as well as the trial court's apparent ignorance of defendant's *expressed concerns* regarding his lack of preparation for trial and defendant's statement that the indictment against him was complex, were factors which weighed against finding a knowing and intelligent waiver. *Id.*

In a recent unpublished opinion, the Michigan Court of Appeals itself addressed the issue of waiver of counsel in a case similar to the case at bar, and determined that a waiver of the right to counsel can *not* be unequivocal where standby counsel is present, relying in part upon the precedent of this Court. *People* v. *Favors*, Mich. Ct. of Appeals No. 215826 (August 28, 2001) (per curiam).

The Michigan Court of Appeals held:

> We first address the prosecutor's argument that defendant waived this issue by electing to represent himself at trial. At the beginning of trial, defendant's court-appointed counsel advised the court that

defendant had filed a grievance against him and refused to talk to him. Counsel asked to withdraw from the case. Defendant told the court that counsel had not filed a motion for an independent DNA expert. Defendant also complained that a private investigator hired by counsel had not come to the prison to see him about possible defense witnesses. *After the court ordered the trial to continue with defense counsel in place, defendant asked if he could represent himself but stated that he wanted defense counsel to remain to assist him. The court allowed this, and the trial proceeded with defense counsel questioning prospective jurors and all witnesses and making opening and closing statements.*

While the right of self representation is secured implicitly by U.S. Const, Am VI and explicitly under [Michigan] Const 1963, Art 1, § 13, the right is not absolute. *People* v. *Anderson*, 398 Mich. 361, 366; 247 N.W.2d 857 (1976). A defendant has either a right to counsel or a right to proceed *in propria persona*, but not both. *People* v. *Adkins* (After Remand), 452 Mich. 702, 720; 551 N.W.2d 108 (1996). A defendant must exhibit an intentional relinquishment of the right to counsel, and the courts should "indulge every reasonable presumption against waiver" of the fundamental right to counsel. *Id.* at 721 (citation omitted). A request for self representation must be unequivocal, and the defendant must assert his right to self representation knowingly, intelligently and voluntarily. *Id.* at 722. *A request to waive appointed counsel and proceed in propria persona does not qualify as unequivocal if conditioned with a request for standby counsel. People* v. *Dennany*, 445 Mich. 412, 446 (Griffin, J.), 458 (Boyle, J.); 519 N.W.2d 128 (1994).

Defendant did not unequivocally request to represent himself because he asked for counsel to remain with him. Therefore, defendant did not waive his right to

> *representation*. Moreover, defendant did not waive a claim of ineffective assistance of counsel, as the prosecution suggests, by responding positively to trial court questioning near the end of trial regarding his satisfaction with counsel's performance. "*Because the appropriate inquiry is not the client's evaluation of counsel's performance, but rather whether counsel is a reasonably effective advocate, 'we attach no weight to either respondent's expression of satisfaction with counsel's performance at the time of his trial, or to his later expression of dissatisfaction.'*" *People* v. *Mitchell*, 454 Mich. 145, 151 n 6; 560 N.W.2d 600 (1997), *quoting*, *United States* v. *Cronic*, 466 U.S. 648, 657 n 21 (1984) (emphasis added).

Thus, according to the Michigan Court of Appeals' own reasoning in *Favors*, Dr. Kevorkian's waiver *could not* have been effective as to all aspects of representation, because, even as he purportedly waived his right to counsel, *he continued to have counsel to assist him, with the Trial Court's approval. Id.* Indeed, Dr. Kevorkian was under the impression that he was represented by counsel throughout the trial, and that his role was to be that of a mouthpiece to present information prepared by his counsel. March 22, 1999 Tr. Vol. 1 at 268; March 23, 1999 Tr. Vol. II at 137; March 23, 1999 Tr. In Chambers Proceedings at 12-13, 25-26.

Furthermore, pursuant to *Favors*, the Michigan Court of Appeals' assertion that Dr. Kevorkian expressed satisfaction with his counsel holds *no weight* with respect to the Court's evaluation of whether Gorosh *in fact* provided effective assistance. In any event, although the Michigan Court of Appeals claims that Dr. Kevorkian "never brought any dissatisfaction with Gorosh to the trial court's attention," it nonetheless acknowledged that "[i]n response to the trial court's questioning, [Dr. Kevorkian] first stated that he was *dissatisfied* with [his attorneys]," before he reversed his position upon prompting from the Trial Court. R. Nov. 21, 2001 Op. at 20, 26.

B. The Question of the Proper Standard of Conduct for Counsel in an Advisory Role is of Constitutional Significance.

Dr. Kevorkian is guaranteed the right to effective assistance of counsel by the United States Constitution. The Sixth Amendment to the Constitution guarantees an accused "the right . . . to have the assistance of counsel for his defense." U.S. Const., Am. VI.

This Court has made clear that the right to counsel includes the right to *effective assistance of counsel*. *McMann* v. *Richardson*, 397 U.S. 759, 771 n.14 (1970). At issue here is not the denial of counsel, but the actual *performance* of counsel. *People* v. *Mitchell*, 454 Mich. 145, 156, 560 N.W.2d 600 (1997). The inquiry into the performance of counsel is particular, and the question is whether counsel's actual performance undermined confidence in the reliability of the result. *Id.*

As the Michigan Court of Appeals acknowledged, there is but a single standard for claims of ineffective assistance of counsel. The benchmark case in Michigan, *People* v. *Pickens*, 446 Mich. 298, 521 N.W.2d 797 (1994), adopted the federal test for reviewing claims of ineffective assistance of counsel set forth by this Court in *Strickland v. Washington*, 466 U.S. 668 (1984).

In order to ascertain whether counsel's assistance was ineffective, the reviewing court must determine: (1) whether counsel's performance was objectively unreasonable; and (2) if so, whether the defendant was so prejudiced by counsel's defective performance that he was deprived of a fair trial[13]. *Id.* at 309.

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13. This Court has held that, in some cases, *Strickland*'s prejudice prong may be presumed based on the particular circumstances of the case. For example, "If the accused is denied counsel at a critical stage of his trial [or] . . . if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." *Cronic*, 648 U.S. at 659. In such a case, it is not necessary to demonstrate actual prejudice. *Rickman* v. *Bell*, 131 F.3d 1150, 1155 (6th Cir. 1997). Moreover, a defendant may demonstrate the

(Cont'd)

The test requires the greatest level of factual inquiry into the *conduct* of the defense and its effect on the outcome of the trial. *Mitchell*, 454 Mich. at 155.

Although the Michigan Court of Appeals refused to apply the *Strickland* standard to Gorosh's performance during trial, it provided no basis as to why this standard should not apply, nor what standard does apply. In fact, under the Michigan Court of Appeals' logic, an attorney who provides only legal advice as an advisor during trial will not be held to *any standard* of professional conduct. This simply can not be the rule, and, inasmuch as this Court has, without exception, insisted that counsel provide performance that is objectively reasonable, this Court should accept the instant application in order to set forth the proper standard for reviewing the performance of counsel who provides advice as well as advocacy during trial.

In any event, Gorosh's assistance was inadequate under any conceivable standard of conduct, especially the standard of conduct required by this Court in *Strickland*, due to numerous errors, miscalculations and breaches of professional responsibility. The information received from Dwyer, Holmes, Schwartz and Dr. Kevorkian himself, as well as the affidavits submitted in support of Defendant's Motion For a New Trial reveal what actually happened during the pre-trial and trial proceedings, and serve to explain why the defense presented on behalf of Dr. Kevorkian was so appallingly inadequate.

The Michigan Court of Appeals acknowledged that Gorosh acted as an advocate for Dr. Kevorkian in presenting various pre-trial motions. *See, e.g.*, March 22, 1999 Tr. Vol. I at 8; R. Nov. 20, 2001 Op. at 24. It is further undisputed that Gorosh

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(Cont'd)
"constructive" denial of counsel when, *although counsel is present*, "'the performance of counsel [is] so inadequate that, in effect, no assistance of counsel is provided.'" *Cronic*, 466 U.S. at 654 n.11, *quoting*, *United States* v. *Decoster*, 199 U.S. App. D.C. 359, 624 F.2d 196, 219 (D.C. Cir. 1976) (MacKinnon, J., concurring).

also acted as an advocate at times during the trial. R. Mar. 12, 1999 Dr. Kevorkian's Appeal Brief at 13-27.

Even assuming *arguendo* that Gorosh did not act as Dr. Kevorkian's advocate during the trial, which he did, it is undisputed that Gorosh *at least* acted as a counselor and advisor to Dr. Kevorkian. In fact, the Trial Court *required* Gorosh to sit at counsel table and directly instructed Dr. Kevorkian to seek advice from his attorneys on numerous occasions. March 22, 1999 Tr. Vol. I at 10-11, 237, 247, 268; March 23, 1999 Tr. Vol. II at 95, 98, 101, 145; March 23, 1999 In Chambers Proceedings Tr. at 25-27; March 25, 1999 Tr. Vol. III at 3. Dr. Kevorkian even indicated his intent to follow the advice of his advisers throughout the trial. March 23, 1999 Tr. In Chambers Proceedings at 12-13. In that capacity, Gorosh was obligated to provide, and Dr. Kevorkian was entitled to receive, effective advice and consultation as to how to conduct his own defense in accord with the Constitutional guarantee of effective assistance of counsel. This Court has held that, "if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." *Cronic*, 466 U.S. at 659. Inasmuch as Gorosh failed to provide any meaningful advice to aid Dr. Kevorkian in his defense, the prosecution's case was not subjected to any meaningful adversary testing.

CONCLUSION

For all the foregoing reasons, Dr. Kevorkian respectfully requests this Honorable Court to grant the instant Petition for Writ of Certiorari, or, in the alternative: (1) order that the charges against Dr. Kevorkian be dismissed in their entirety, with prejudice, inasmuch as the acts of Dr. Kevorkian are protected by the United States Constitution; or (2) vacate the verdict and Judgment of Sentence against Dr. Kevorkian, rendered in violation of the United States Constitution, and remand this case to the Michigan Courts for a full and fair trial wherein Dr. Kevorkian's Constitutional rights are fully protected.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE COURT OF APPEALS FOR THE STATE OF MICHIGAN DATED NOVEMBER 20, 2001

STATE OF MICHIGAN
COURT OF APPEALS

No. 221758
Oakland Circuit Court
LC No. 98-163675-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v.

JACK KEVORKIAN,

Defendant-Appellant.

Before: HOEKSTRA, P.J., and SAAD and WHITBECK, JJ.

WHITBECK, J.

A jury convicted defendant of second-degree murder[1] and delivering a controlled substance.[2] The trial court sentenced him to concurrent prison terms of ten to twenty-five years for the murder conviction and seven years for the controlled substance conviction. Defendant appeals of right and we affirm.

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1. MCL 750.317.

2. MCL 333.7401(2)(b).

Appendix A

I. Overview

This case is about death; in particular, the death of former racecar driver Thomas Youk in September 1998. Youk was fifty-two years old and had amyotrophic lateral sclerosis (ALS), also known as Lou Gehrig's disease. Defendant twice videotaped himself interacting with Youk. In the first videotape, defendant went to Youk's home to discuss his condition. In the second videotape, defendant administered a lethal drug to Youk. Defendant later was a guest on the television news show *60 Minutes,* during which segments from both videotapes were shown. The jury saw the videotapes and the *60 Minutes* interview at defendant's trial. Nevertheless, defendant attempted to persuade the jury not to convict him because the murder he was charged with committing was, in his view, a "mercy killing."

Given this factual setting, this appeal presents a fascinating paradox. Though he made an impassioned plea to the jury to adopt his views on euthanasia, in this appeal defendant has given almost no attention to his claim that this homicide had a legal justification or excuse. Indeed, exactly seven of the fifty pages in his brief to this Court address euthanasia. Even during oral arguments, defendant's appellate counsel made not a single reference to this issue.

Nevertheless, euthanasia is at the core of this case. But for defendant's self-described zealotry, Thomas Youk's death would, in all probability, not have been the subject of national attention, much less a murder trial. Defendant, in what is now apparently something of an afterthought, asks us to conclude that euthanasia is legal and, therefore, to

reverse his conviction on constitutional grounds. We refuse. Such a holding would be the first step down a very steep and very slippery slope. To paraphrase the United States Supreme Court in *Washington v. Glucksberg*,[3] it would expand the right to privacy to include a right to commit euthanasia and thus place the issue outside the arenas of public debate and legislative action. Such a holding would also involve the judiciary in deciding questions that are simply beyond our capacity. Succinctly put, there is no principled basis for us to legalize euthanasia.

Defendant's other issues are more mundane and we describe the relevant facts in more detail in the appropriate discussion sections. First, defendant asserts that his trial attorney, David Gorosh, did not provide him with his constitutional right to effective representation. However, defendant has failed to demonstrate that Gorosh performed deficiently at any time he actually acted as counsel. Defendant also failed to prove that Gorosh, while acting as standby counsel, took control of the case or did anything to destroy the jury's perception that defendant was representing himself. Even assuming for the sake of argument that a claim for ineffective assistance of standby counsel is legally cognizable, defendant still has not proven that Gorosh acted deficiently and prejudicially. Defendant chose — almost certainly unwisely but nevertheless knowingly, intelligently, voluntarily, and unequivocally — to represent himself. He cannot now assign the blame for his conviction to someone who did not act as his trial counsel.

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3. *Washington v. Glucksberg*, 521 U.S. 702, 721, 117 S.Ct. 2258, 2268, 138 L.Ed.2d 772 (1997).

Second, defendant claims that the prosecutor improperly referred to defendant's decision to exercise his right to remain silent, thereby denying him his rights under the Fifth Amendment. The remarks at issue were the prosecutor's proper objections to defendant's repeated and improper attempts to inject facts that were not in evidence into his closing argument As such, the prosecutor's remarks were not direct and unequivocal references to defendant's failure to testify, and therefore, the making of those remarks did not constitute misconduct.

Third, defendant claims that the trial court erred in excluding the testimony of Terrence and Melody Youk. However, defendant misreads the applicable standards with respect to *res gestae* witnesses and then fails entirely to demonstrate how the proposed testimony would have been relevant. Thus, even on this narrow evidentiary issue, defendant's arguments have no merit.

II. The Death Of Thomas Youk

A. The September 15, 1998, Videotape

On September 15, 1998, at 9:55 p.m., defendant went to Youk's home to discuss Youk's condition. As the videotape of this discussion revealed, defendant stated that he was recording their interaction in "connection with a request from Thomas [Youk] for help in . . . ending his suffering." Youk then described his condition. He recalled that his symptoms of ALS first became obvious to him in 1994, and that he had been confined to a wheelchair since 1997. By September of

1998, Youk said, he could not move his left arm or his legs, he had minimal use of his right arm, he had difficulty swallowing and breathing, he was fed through a tube, and he was forced to use a machine to help him breathe. Youk stated that, at the time, he could not do anything for himself, that he had discussed "his wishes" with his mother, brothers, and wife, and that they "understand why. It's my decision."

Defendant then told Youk that he needed to sign a form indicating that he was consenting to a "direct injection instead of using the device, the machine." Defendant asked Youk if he wished to donate his organs, and Youk declined. Defendant then read the consent form, which stated in part:

> I, Thomas Youk, the undersigned, entirely voluntarily, without any reservation, external persuasion, pressure, or duress, and after prolonged and thorough deliberation, hereby consent to the following medical procedure of my own choosing, and that you have chosen direct injection, or what they call active euthanasia, to be administered by a competent medical professional, in order to end with certainty my intolerable and hopelessly incurable suffering.

The meeting ended at 10:15 p.m.

B. The September 16, 1998, Videotape

On September 16, 1998, at 9:49 p.m., defendant again videotaped himself and Youk at Youk's home. Youk stated that he "wanted to go through with this" and signed the

consent form. Defendant remarked that he would inject Youk in the vein because "it's quicker," and stated, "now I'm going to put on a cardiogram so we know when your heart is stopped, okay." Defendant established a connection between Youk and the electrocardiogram. Defendant injected Youk with Anectine and Seconal before injecting Youk with potassium chloride. During this time, defendant provided a commentary on what was occurring:

> Sleepy Tom? Tom are you asleep? And now we'll inject the Anectine. You asleep Tom? Tom? You asleep? He's asleep. Now the Potassium Chloride. This machine is recording for some reason so I'm pulling it by hand until the heart stops. It's been, it's been about two minutes since I injected the, ah, seconal, and one minute since I injected the —. Now we're getting agonal complexes and that's about the, the Potassium Chloride will stop the heart, so. Now there's a straight line. A straight line and the cardiogram will be turned off. His heart is stopped.

C. Cause Of Death

The police were dispatched to Youk's house on September 17, 1998, at 1:30 a.m. They found Youk lying on his bed, dead. The police also found a Federal Express receipt with defendant's name at the scene. Officials conducted Youk's autopsy at 10:00 a.m. the same day. The medical examiner listed the manner of death as homicide and the cause of death as intravenous injection of substances. During the autopsy, the medical examiner found two "fresh" needle

marks on Youk's left and right wrists that had been covered with makeup. The autopsy protocol stated that the cause of death was "poisoning by intravenous injection of substances."

Oakland County Medical Examiner Ljubisa J. Dragovic, an expert in neuropathology and pathology who later testified for the prosecution at defendant's trial, witnessed the autopsy. Dr. Dragovic found three significant drugs in Youk's bodily fluids. First, Youk had a high level of the barbiturate Seconal, also known as Secobarbital, in his blood. Seconal is a Schedule 2 controlled substance[4] typically used to induce sleep. Dr. Dragovic believed that the amount of Seconal in Youk's blood would have killed him in a few hours. Second, Dr. Dragovic found Anectine, a paralyzing muscle relaxant, present in Youk's body in an amount that could have killed Youk within five to eight minutes by causing brain death. However, Dr. Dragovic determined that it was the third drug, potassium chloride, that defendant injected into Youk that caused his death. As Dr. Dragovic explained, when potassium chloride is injected into the body in a concentrated form at once, rather than in small amounts over time, it stops the heart from beating within a matter of seconds. According to Dr. Dragovic, the toxicology reports did not reveal the presence of potassium chloride in Youk's body because that substance is naturally present in the body after red blood cells die.

Dr. Dragovic also confirmed that Youk had ALS. However, in Dr. Dragovic's opinion, Youk did not die from ALS, ALS was not an underlying cause of Youk's death, and

4. Dr. Dragovic explained that the Board of Pharmacy *and* the Federal Drug Enforcement Agency must license a physician to prescribe Seconal.

ALS did not contribute to Youk's death in any way. Rather, Dr. Dragovic firmly reiterated that the poisons injected into Youk killed him, constituting a homicide.

D. The *60 Minutes* Interview

News correspondent Mike Wallace interviewed defendant for *60 Minutes*. In the first clip from the interview shown to the jury, Wallace stated at the outset, "You killed him." Defendant responded: "I did, but it could be Manslaughter not Murder. It's not necessarily Murder. But it doesn't bother me what you call it. I know what it is. This could never be a crime in any society which deems itself enlightened." Defendant indicated that he was making an example of Youk. Wallace then suggested that Youk was initially a little reluctant because Youk "thought he was getting assisted suicide." Defendant replied that "this is better than assisted suicide, I explained that to him. It's better control."

Defendant also explained to Wallace the process leading to Youk's death. According to defendant, the first injection paralyzed Youk's muscles and slowed his ability to take in oxygen. When the oxygen was "cut off" and Youk could not breathe, defendant injected the "potassium chloride to stop the heart." Defendant then told Wallace that "[e]ither they go or I go," apparently meaning that he would be acquitted for killing Youk or, if convicted, he would starve to death in prison. As defendant put it: "I've got to force them to act. They must charge me. Because if they do not, that means they don't think it's a crime. Because they don't need any more evidence do they? Do you have to dust for fingerprints on this[?]"

Wallace suggested that defendant was "engaged in a political, medical, macabre . . . publicity venture," and had a "ghoulish . . . desire to see the deed done." Defendant did not disagree with those assertions, stating: "Well, it could be, I, I can't argue with that. Maybe it is ghoulish. I don't know. It appears that way to you. I can't criticize you for that." In fact, defendant agreed with Wallace, emphasizing that "the main point is . . . that the deed be done." Evidently in response to the argument that legalizing euthanasia could be problematic in practice, defendant commented that "[e]verything can be abused. You learn from abuse, you punish the abuser, and then . . . if you want to control, you say that only certain doctors can do this in certain areas, nobody else. . . . That's the way to control it."

Defendant then returned to one of his main themes, saying:

> If you don't have liberty and self-determination, you got nothing. That's what this country's built on and this is the ultimate self-determination to determine when and how you're gonna die when you're suffering.

Wallace: And those who say that [defendant], Dr. Death, is a fanatic?

> [*Defendant*]: Zealot. No, not if, sure, you try to take a liberty away and I turn fanatic. . . . I'm fighting for me, Mike, me. This is a right I want when I, I'm 71, I'll be 71. You don't know what'll happen when you get older. I may end up terribly

suffering. I want some colleague to be free to come and help me when I say the time has come. That's why I'm fighting for, me. Now that sounds selfish. And if it helps everybody else, so be it.

III. Euthanasia And The Constitution

A. Facts And Argument

Before trial, defendant, relying on the Ninth Amendment,[5] filed a motion asking the trial court to dismiss the charges against him. Evidently, defendant intended to argue that the people had retained the right to active euthanasia. The trial court denied the motion on the grounds that it was untimely and that defendant had failed to cite any support for his argument. Defendant then filed an emergency application for leave to appeal the trial court's order with this Court. In addition to challenging the trial court's ruling, he also claimed that the prosecution violated the Michigan constitutional counterpart to the Ninth Amendment's.[6] This Court ultimately determined that defendant failed to articulate the need for immediate appellate review.[7]

On appeal, defendant makes two related, but separate, constitutional arguments. First, he argues that the unenumerated rights protected by the Ninth Amendment and

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5. U.S. Const., Am. IX.

6. Const. 1963, art. 1, § 23.

7. *People v. Kevorkian,* unpublished order of the Court of Appeals, entered March 16, 1999 (Docket No. 218077).

its Michigan constitutional counterpart[8] include a patient's right to be free from unbearable pain and suffering. Second, he maintains that the Fourteenth Amendment[9] and its Michigan constitutional counterpart[10] also include this right by proscribing state deprivation of liberty without due process of law either under constitutional privacy concepts or as a "necessary and direct corollary of this position . . . that a person should not be forced to suffer unbearably." Defendant claims that he has standing to raise these due process arguments. Defendant thus contends that he is entitled to have his murder conviction reversed and no further criminal proceedings instituted against him for "aiding in Thomas Youk's assertion of his constitutional right to be free from intolerable pain and suffering."

B. Standard Of Review

We review a trial court's decision to grant or deny a motion to dismiss charges for an abuse of discretion.[11] However, review de novo is appropriate for the core constitutional questions that underlie the trial court's ruling on the motion to dismiss the charges.[12]

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8. Const. 1963, art. 1, § 23.

9. U.S. Const., Am. XIV.

10. Const. 1963, art. 1, § 17.

11. See *People v. Adams*, 232 Mich.App. 128, 132, 591 N.W.2d 44 (1998).

12. See *People v. Houstina*, 216 Mich.App. 70, 73, 549 N.W.2d 11 (1996).

Appendix A

C. Constitutional Provisions

The Ninth Amendment of the United States Constitution states, in relevant part, that "[t]he enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."[13] The counterpart provision in the Michigan Constitution states that "[t]he enumeration in this constitution of certain rights shall not be construed to deny or disparage others retained by the people."[14]

The Fourteenth Amendment of the United States Constitution states, in relevant part, that no state shall "deprive any person of life, liberty, or property, without due process of law."[15] The counterpart provision in the Michigan Constitution states, in relevant part, that "[n]o person shall be . . . deprived of life, liberty or property, without due process of law."[16]

D. The Nature Of Defendant's Arguments

At the outset it is important to understand the nature of defendant's constitutional claims. The best way to do this is to state clearly the constitutional arguments that defendant does *not* raise.

13. U.S. Const., Am. IX.

14. Const. 1963, art. 1, § 23.

15. U.S. Const., Am. XIV.

16. Const. 1963, art. 1, § 17.

First, defendant does *not* ask us to hold that he acted properly in furtherance of the right to refuse life-sustaining medical treatment. In *Cruzan v. Director, Missouri Dep't of Health*,[17] the United States Supreme Court "assume[d] that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition," likely under a Fourteenth Amendment due process liberty interest analysis.[18] More recently, in *Glucksberg*,[19] the Court strengthened the constitutional basis for the *Cruzan* decision, interpreting *Cruzan* as holding that "the right to refuse unwanted medical treatment was so rooted in our history, tradition, and practice as to require special protection under the Fourteenth Amendment." Here, defendant does not, and could not, rely on *Cruzan;* factually, this case does not involve removing life support. Further, though not resting their decisions precisely on the Fourteenth Amendment, Michigan courts have arrived at the same conclusion regarding a patient's right to refuse life-sustaining medical care.[20] The limited scope of these cases does not establish a right to be free from unbearable pain and suffering that would make euthanasia legal. There is, of course, a substantial factual distinction between refusing care, even if doing so hastens death, and purposefully ending a life.

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17. *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 279, 110 S. Ct. 2841, 2852, 111 L. Ed. 2d 224 (1990).

18. *Id.* at 279, n.7.

19. *Glucksberg, supra* at 722.

20. See *In re Martin*, 450 Mich. 204, 215-216, 538 N.W.2d 399 (1995), discussing *In re Rosebush*, 195 Mich. App. 675, 491 N.W.2d 633 (1992).

Second, defendant does *not* make any claim that this case concerns medical efforts to relieve pain or discomfort, though these medical efforts may hasten death. Michigan exempts such medical efforts from criminal penalties.[21] Importantly, however, the exemption does not apply to medical efforts designed to *cause* death.[22] Factually, there is not a scintilla of evidence that defendant administered potassium chloride to Youk to relieve Youk's pain or discomfort. Defendant admits as much in his brief on appeal:

> The only medical relief for Thomas Youk's conditions was the relief that he sought from [defendant]. The injection [defendant] gave to Thomas Youk was the only effective medical way to alleviate Thomas Youk's unbearable suffering. *No pain medication would suffice, and there was no other beneficial medical alternative that would have aided Thomas Youk.*[23]

Third, defendant does *not* ask us to find that his actions in this matter constituted some form of permissible assisted suicide. In Michigan, assisting in a suicide — that is, providing the physical means by which another person attempts or commits suicide or participating in a physical

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21. See M.C.L. § 752.1027(3) ("[P]rescribing, dispensing, or administering medications or procedures if the intent is to relieve pain or discomfort and *not to cause death,* even if the medication or procedure may hasten or increase the risk of death" is not the felony of assisted suicide.) (Emphasis added).

22. *Id.*

23. Emphasis supplied.

act by which another person attempts or commits suicide — is illegal.[24] The Michigan Supreme Court has upheld the statute in question against both a title-object clause challenge under the Michigan Constitution and a Due Process Clause challenge under the United States Constitution.[25] In reaching its decision on the due process challenge, a majority of the Court observed:

> Presently, a substantial number of jurisdictions have specific statutes that criminalize assisted suicide and the Model Penal Code also provides for criminal penalties. Further, nearly all states expressly disapprove of suicide and assisted suicide either in statutes dealing with durable powers of attorney in health-care situations, or in "living will" statutes. In addition, all states provide for the involuntary commitment of persons who may harm themselves as the result of mental illness, and a number of states allow the use of nondeadly force to thwart suicide attempts.[26]

Referring to *Cruzan*, the majority observed:

> Indeed, the United States Supreme Court repeatedly and unequivocally has affirmed the

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24. See M.C.L. § 752.1027.

25. *People v. Kevorkian*, 447 Mich. 436, 445-446, 527 N.W.2d 714 (1994) (*Kevorkian I*).

26. *Id.* at 478-479; Justices Cavanagh, Brickley, and Griffin, joined by Justices Boyle and Riley.

> sanctity of human life and rejected the notion that there is a right of self-destruction inherent in any common-law doctrine or constitutional phrase.[27]

Several years after the Michigan Supreme Court decision in *Kevorkian*, the Court in *Glucksberg* upheld a similar Washington statute against a similar due process clause challenge under the United States Constitution.[28] The *Glucksberg* majority held that the prohibition in the Washington statute against "caus[ing]" or "aid[ing]" a suicide did not offend the Fourteenth Amendment of the United States Constitution.[29]

Here, defendant makes no attempt to assert that he was engaged in assisted suicide when he injected Youk with potassium chloride, causing his death. Rather, he asserts that if the Ninth Amendment "is to have any substantive meaning," the right to be free from inexorable pain and suffering must be among the unenumerated rights protected by that amendment and its Michigan counterpart. Further, defendant asserts that the right to be free of unbearable pain and suffering caused by a medical condition is inherently part of the liberty interests secured by the Fourteenth Amendment and its Michigan counterpart. Defendant then contends that he cannot be prosecuted for "aiding in Thomas Youk's assertion of his constitutional right to be free from

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27. *Id.* at 480-481.

28. In *Vacco v. Quill*, 521 U.S. 793, 117 S.Ct. 2293, 138 L.Ed.2d 834 (1997), decided the same day, the Court upheld New York's assisted suicide ban against an Equal Protection Clause challenge.

29. *Glucksberg*, *supra* at 705-706.

intolerable pain and suffering." Although defendant's appellate counsel has carefully avoided using the words, as we noted above, the record indicates that defendant was quite specific when describing his actions; he said he was engaged in "active euthanasia" and the consent form that Youk signed directly refers to such active euthanasia.

In summary, defendant does not, nor could he, ask us to hold that his actions were legally justifiable because he simply helped Youk exercise his right to refuse medical care. Defendant does not, nor could he, ask us to hold that he was lawfully attempting to alleviate Youk's pain and suffering by any means other than causing his death. Defendant does not, nor could he, ask us to hold that his actions constituted a legal form of assisted suicide. In a nutshell, and using his own terminology, defendant asks us to legalize euthanasia.

E. Reserved Rights

Defendant's argument that the people have reserved the right to euthanasia under the Ninth Amendment and its Michigan counterpart is basically formless. He states that a right to be free from inexorable pain and suffering "must be among" the rights protected by these two constitutional provisions. Further, he argues that states "should recognize such a right and give it force." Defendant does not cite a single case for this extraordinary request. As the Supreme Court said in *Mitcham v. Detroit*,[30]

> It is not enough for an appellant in his brief simply to announce a position or assert an error and then

30. *Mitcham v. Detroit*, 355 Mich. 182, 94 N.W.2d 388 (1959).

> leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. The appellant himself must first adequately prime the pump; only then does the appellate well begin to flow. Failure to brief a question on appeal is tantamount to abandoning it.[31]

We conclude, therefore, that defendant has abandoned this argument on appeal.

F. Euthanasia As A Due Process Right To Privacy

(1) Defendant's Argument

Defendant starts with the proposition that there is a right to privacy that is part of the liberty interest protected by the Fourteenth Amendment and its Michigan counterpart. He then asserts that the "intensely personal and private right of a patient to be free from intolerable and irremediable suffering" is either part of or similar to this privacy right. Citing *Vacco*, he argues that if the administration of aggressive painkilling drugs is acceptable even if this may hasten death, then the "necessary and direct corollary of this position is that a person should not be forced to suffer unbearably."

Defendant then reviews the positions of Justices O'Connor, Breyer, Souter, and Stevens in *Glucksberg* to reach

31. *Id.* at 203 (citations omitted).

the conclusion that "Justices on the Supreme Court have suggested allowing for interpretation of the Fourteenth Amendment's guarantee of liberty to apply to various privacy rights, including those related to personal and private medical procedures."[32] Finally, defendant argues that he has standing to assert Youk's constitutional right to be free from intolerable pain, claiming that Justice Stevens in *Glucksberg*,[33] "recognized the possibility that an individual who provides assistance to a patient who was suffering interminably could prevail on a Constitutional challenge" and that, if we agree that there is a constitutionally protected right to be free from unbearable suffering, then the charges against him must be dismissed. We do not agree.

(2) Encompassing Euthanasia Within The Right To Privacy

It is one thing to assert, as defendant does, that there is a large body of case law suggesting that due process sometimes relies on the right to privacy to protect fundamental liberty interests.[34] It is quite another thing, however, to conclude that the right to privacy encompasses euthanasia. As Justice

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32. This argument reflects defendant's remarks on the second day of trial in which he asserted that justices of the United States Supreme Court want a particularized case and that "Four of them said we want to revisit this issue again."

33. *Glucksberg*, *supra* at 750.

34. We need not address the question whether there is, in fact, a right to privacy under the United States and Michigan Constitutions; for the purposes of dealing with defendant's arguments here, we have assumed the existence of such a right.

Jackson once pointedly noted, the enduring nature of precedent gives judicial opinions a force all their own.[35]

> The principle then lies about like a loaded weapon. . . . Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes. All who observe the work of courts are familiar with what Judge Cardozo described as "the tendency of a principle to expand itself to the limit of its logic."[36]

Defendant urges us to pick up the loaded weapon of the right to privacy cases. He asks us to use this weapon to resolve the situation faced by a person who suffers from literally unbearable pain and who wishes to end that pain by dying. As Justice O'Connor described it: "Death will be different for each of us. For many, the last days will be spent in physical pain and perhaps the despair that accompanies physical deterioration and a loss of control of basic bodily and mental functions."[37]

We decline, however, to pick up this loaded weapon for three basic reasons. First, we can find no meaningful precedent for expanding the right to privacy to include a right to commit euthanasia so that an individual can be free from

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35. *Korematsu v. United States*, 323 U.S. 214, 246, 65 S. Ct. 193, 89 L. Ed. 194 (1944) (Jackson, J., dissenting).

36. *Id.*, quoting Cardozo, *Nature of the Judicial Process* (1932), p. 51.

37. *Glucksberg, supra* at 736.

intolerable and irremediable suffering. To our knowledge, no court of last resort in this country has ever recognized such a right. Even in the assisted suicide cases dealing with an asserted "right to die," courts have steadfastly refused to expand the right to privacy to include the right to commit or receive euthanasia. As Chief Justice Cavanagh and Justices Brickley and Griffin explained while describing the boundaries of the right to privacy in end-of-life cases:

> We do not discern in *Cruzan* and its historic roots an indication that the federal constitution protects a right more expansive than the right to refuse to begin or to continue life-sustaining medical treatment. Neither do we find in *Casey* or in the precedent from which it evolved an intent to expand the liberty interests identified by the Court in such a manner.[38]

Similarly, in *Glucksberg*, a majority of the United States Supreme Court concluded that the asserted "right" to assistance in committing suicide "is not a fundamental liberty interest protected by the Due Process Clause."[39] Instead, the Court determined that a state has legitimate and countervailing interests in preserving life,[40] preventing

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38. *Kevorkian I, supra* at 465 (Cavanagh, C.J., and Brickley and Griffin, JJ.).

39. *Glucksberg, supra* at 736.

40. *Id.*, noting that the Model Penal Code, § 210.5, Comment 5, at 100 states that '[T]he interests in the sanctity of life that are represented by the criminal homicide laws are threatened by one who expresses a willingness to participate in taking the life of another.'

suicide,[41] protecting the integrity and ethics of the medical profession, protecting vulnerable groups from abuse, neglect, and mistakes,[42] and acknowledging the equal value of all people.[43] Most importantly, the *Glucksberg* majority noted that states "may fear that permitting assisted suicide will start it down the path to voluntary and perhaps even involuntary euthanasia."[44] In commenting on the Ninth Circuit Court of Appeals decision in the underlying case,[45] the majority of the Court said:

> The Court of Appeals' decision, and its expansive reasoning, provide ample support for the [State of Washington's] concerns. The court noted, for example, that the "decision of a duly appointed surrogate decision maker is for all legal purposes the decision of the patient himself;" . . . that "in some instances the patient may be unable to self-

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41. *Glucksberg, supra* at 730, citing H. Hendin, *Seduced by death: Doctors, Patients and the Dutch Cure*, 24-25 (1997) ("Research indicates, however, that many people who request physician-assisted suicide withdraw that request if their depression and pain are treated.").

42. *Id.* at 731, quoting the Council on Ethical and Judicial Affairs, *Decisions Near the End of Life*, 267 JAMA 2229, 2233 (1992) ("[T]he societal risk of involving physicians in medical interventions to cause patients' deaths is too great.").

43. *Glucksberg*, *supra.* at 728-732.

44. *Id.* at 732.

45. *Compassion in Dying v. Washington*, 79 F.3d 790 (CA 9, 1996).

> administer the drugs and . . . administration by the physician . . . may be the only way the patient may be able to receive them;" . . . and that not only physicians, but also family members and loved ones will inevitably participate in assisting suicide. . . . Thus, it turns out that what is couched as a limited right to "physician-assisted suicide" is likely, in effect, a much broader license, which could prove extremely difficult to police and contain. [The state of] Washington's ban on assisting suicide prevents such erosion.[46]

The majority then turned, directly, to the "slippery slope" argument. The majority cited *United States v. 12,200-ft Reels of Super 8MM Film*[47] for the proposition that "[e]ach step, when taken, appear[s] a reasonable step in relation to that which preceded it, although the aggregate or end result is one that would never have been seriously considered in the first instance."[48] The majority referred to *Physician-Assisted Suicide and Euthanasia in the Netherlands*[49] as suggesting that

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46. *Glucksberg, supra* at 733 (citations omitted).

47. *United States v. 12,200-ft Reels of Super MM Film*, 413 U.S. 123, 127; 93 S.Ct. 2665; 37 L. Ed. 2d 500 (1973).

48. The Court also referred to Justice Cardozo's observation in *The Nature of the Judicial Process*, 51 (1932) of "[t]he tendency of a principle to expand itself to the limit of its logic." *Glucksberg, supra* at 733, n.23.

49. A Report of Chairman Charles T. Canady to the Subcommittee on the Constitution of the House Committee on the Judiciary, 104th Cong., 2d Sess. (Comm. Print, 1966), at 16-21.

> despite the existence of various reporting procedures, euthanasia in the Netherlands has not been limited to competent, terminally ill adults who are enduring physical suffering, and that regulation of the practice may not have prevented abuses in cases involving vulnerable persons, including severely disabled neonates and elderly persons suffering from dementia.[50]

Here, expanding the right to privacy would begin, as the steps in the progression of defendant's argument supporting voluntary euthanasia clearly indicate, the slide down the slippery slope toward euthanasia. No court of final jurisdiction has so expanded the right to privacy. As a state court of intermediate appellate jurisdiction, neither will we.

Second, we conclude that by expanding the right to privacy as defendant suggests, we would, to a great extent, place the matter outside the arenas of public debate and legislative action.[51] Whatever the life experiences or the policy preferences of the members of this Court might be, we must exercise the utmost care to assure, when asked to break new ground, that the liberty protected by the Due Process Clause of the Fourteenth Amendment not be subtly transformed into an expression of personal belief rather than an adherence to the rule of law.[52] If society is to recognize a right to be free from intolerable and irremediable suffering,

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50. *Glucksberg*, *supra* at 734.

51. *Id.* at 720.

52. See *Moore v. East Cleveland, Ohio*, 431 U.S. 494, 502; 97 S. Ct. 1932; 52 L. Ed. 2d 531 (1977) (plurality opinion).

it should do so through the action of the majority of the Legislature, whose role it is to set social policy,[53] or by action of the people through ballot initiative. As the Michigan Supreme Court observed when analyzing the constitutionality of the prohibition of assisted suicide:

> We are keenly aware of the intense emotions and competing moral philosophies that characterize the present debate about suicide in general, and assisted suicide in particular. The issues do not lend themselves to simple answers. However, while the complexity of the matter does not permit us to avoid the critical constitutional questions, neither does it, under the guise of constitutional interpretation, permit us to expand the judicial powers of this Court, especially where the question clearly is a policy one that is appropriately left to the citizenry for resolution, either through its elected representatives or through a ballot initiative under Const. 1963, art. 1, § 9.[54]

Third, we observe that by expanding the right of privacy to include a right to commit euthanasia in order to end

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53. See *Taylor v. Kurapati*, 236 Mich. App. 315, 355; 600 N.W.2d 670 (1999).

54. *Kevorkian I, supra* at 481-482; see also *In re Marling v. Kevorkian*, 456 Mich. 1223; 575 N.W.2d 550 (1998); *Kevorkian v. American Medical Ass'n*, 237 Mich. App. 1; 602 N.W.2d 233 (1999); *People ex rel Oakland Co. Prosecuting Attorney v. Kevorkian*, 210 Mich. App. 601; 534 N.W.2d 172 (1995).

intolerable and irremediable suffering we would inevitably involve the judiciary in deciding questions that are simply beyond its capacity. There is no court that can answer the question of how *much* pain, or perception of pain by a third party, is necessary before the suffering becomes intolerable and irremediable. The role of the courts is to serve neither as physicians nor as theologians. In *Glucksberg,* Justice Stevens briefly discussed the United States Supreme Court's changing attitude toward the death penalty, noting that "there is no absolute requirement that a State treat all human life as having an equal right to preservation."[55] Though other jurisdictions may not value all life equally, that is not true in Michigan.[56] In a state that constitutionally prohibits putting to death the convicted perpetrator of even the most heinous of crimes,[57] courts are simply unsuited to make that decision with respect to the innocent. No judge, no matter how learned, can assess the quality of human life and determine, as a matter of law, that putting an end to suffering is justifiable in one case while in another case it is not. This sort of subjective determination would be unavoidable if we begin, through judicial intervention, to decide who shall live and who shall die.

Rather, the role of the courts is to apply the rule of law. As Chief Justice Burger once eloquently explained:

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55. *Glucksberg, supra* at 739.

56. See, generally, *Taylor, supra.*

57. See Const. 1963, art. 4, § 46; *Glucksberg, supra* at 741, (Stevens, J., concurring) (emphasizing the incompatibility of Washington's argument that life must be saved with the fact that it has the death penalty).

Appendix A

It is often observed that hard cases make bad law. I suspect there is some truth to that adage, for the "hard" cases always tempt judges to exceed the limits of their authority . . . to reach a "desirable" result. Cardozo no doubt had this type of case in mind when he wrote:

"The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to 'the primordial necessity of order in the social life.' Wide enough in all conscience is the field of discretion that remains." The Nature of the Judicial Process, 141 (1921).

What Cardozo tells us is beware the "good result," achieved by judicially unauthorized or intellectually dishonest means on the appealing notion that the desirable ends justify the improper judicial means. For there is always the danger that the seeds of precedent sown by good men for the best of motives will yield a rich harvest of unprincipled acts of others also aiming at "good ends."[58]

58. See *United Steelworkers of America, AFL-CIO-CLC v. Weber*, 443 U.S. 193, 218-219, 99 S. Ct. 2721, 61 L. Ed. 2d 480 (1979) (Burger, C.J., dissenting).

Simply put, the courts are not free to create new rights out of whole cloth. We will not do so here.

(3) "A More Particularized Challenge"

The structure of the *Glucksberg* opinion reflects the complexity of the assisted suicide issue, an issue certainly less complex than euthanasia. In *Glucksberg,* Chief Justice Rhenquist wrote the opinion announcing the Court's decision. Justices O'Connor, Scalia, Kennedy, and Thomas joined this opinion, constituting a solid five-person majority. Nevertheless, *Glucksberg* consists of more than the majority opinion. Justice O'Connor wrote a concurrence, which Justices Ginsburg and Breyer joined. At the same time, Justices Stevens, Souter, Ginsburg, and Breyer each wrote their own concurring opinions. Thus, while the majority opinion in *Glucksberg* is plainly identifiable, the nine individual justices' views on the assisted suicide issue are far from uniform.

Defendant seizes on these concurrences in *Glucksberg* as evidence that the United States Supreme Court would find a constitutional basis for assisted suicide if presented with "a more particularized challenge." Defendant's assumption is that this is the perfect test case; this is the "more particularized challenge"[59] that will bring sweeping changes to constitutional law affecting not only assisted suicide, but creating a right to commit euthanasia. As outlined above, assisted suicide is not at issue here; rather, the fundamental question here is whether there is a right to commit euthanasia.

59. *Glucksberg*, *supra* at 750 (Stevens, J., concurring).

Appendix A

Defendant's observation that the concurring justices in *Glucksberg* each expressed, in varying degrees, their reservations about the sweep of the majority opinion is accurate. However, as is profoundly clear from each of their concurring opinions, there is not a hint in *any* of the language that *any* of the concurring justices used that *any* of them would recognize a right to commit euthanasia.

Justice O'Connor attempted to avoid dealing directly with the limits on a patient's right to avoid suffering, writing:

> [T]here is no need to address the question whether suffering patients have a constitutionally cognizable interest in obtaining relief from the suffering that they may experience in the last days of their lives. There is no dispute that dying patients in Washington and New York can obtain palliative care, even when doing so would hasten their deaths. The difficulty in defining terminal illness and the risk that a dying patient's request for assistance in ending his or her life might not be truly voluntary justifies the prohibitions on assisted suicide we uphold here.[60]

However, she also agreed with the majority that "there is no generalized right to 'commit suicide,' "[61] and that the "State's interests in protecting those who are not truly competent or facing imminent death, or those whose decisions to hasten

60. *Id.* at 737-738 (O'Connor, J., concurring).

61. *Id.* at 736.

death would not truly be voluntary, are sufficiently weighty to justify a prohibition against physician-assisted suicide."[62]

Justice Ginsburg's concurrence consisted of the single statement that she "concur[red] in the Court's judgments . . . substantially for the reasons stated by Justice O'Connor. . . ."

Justice Breyer disagreed with the way the majority framed the issue on appeal as the right to assisted suicide, instead preferring to examine whether a " 'right to die with dignity' " existed.[63] Despite reframing this issue, as "rough"[64] as it was, Justice Breyer ultimately adopted a tack quite close to that of Justice O'Connor, stating:

> I do not believe . . . that this Court need or now should decide whether or not such a right [to die with dignity] is "fundamental." That is because, in my view, the avoidance of severe physical pain (connected with death) would have to constitute an essential part of any successful claim and because . . . the laws before us do not *force* a dying person to undergo that kind of pain. . . .
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> * * *
>
> Were the legal circumstances different — for example, were state law to prevent the provision

62. *Id.* at 737.

63. *Id.* at 790 (Breyer, J., concurring).

64. *Id.*

> of palliative care, including the administration of drugs as needed to avoid pain at the end of life — then the law's impact upon serious and otherwise unavoidable physical pain (accompanying death) would be more directly at issue. And . . . the Court might have to revisit its conclusions in these cases.[65]

Thus, Justice Breyer's concurrence implies that he, too, believes that the state has a legally cognizable interest in preventing death, even when it is desired, as long as the state does not bar other efforts to alleviate suffering.

Justice Souter's concerns were somewhat different. He drew parallels between the right to "bodily integrity" and patients' insistence that they not merely be drugged into a "stupor" to make them unaware of their pain, but that they had a right to exercise their autonomy by dying, in the process avoiding "helplessness" and "dependency."[66] In this regard, he noted that a physician is not just a "mechanic of the human body," but one who "ministers" to patients as whole individuals.[67] Justice Souter reflected on the complexity and necessity of the patient-physician relationship in times of great suffering, refusing to minimize the individual interests at stake.[68] Justice Souter did not close forever the doors to the Court regarding the assisted suicide issue. However, in

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65. *Id.* at 791, 792.

66. See *id.* at 777-779 (Souter, J., concurring).

67. *Id.* at 779.

68. *Id.* at 782.

the end, he concluded that the legislature, not the Court, had the "institutional competence" to address this issue.[69]

Nevertheless, Justice Souter emphasized time and again the risk that acknowledging a right to assisted suicide would lead to legalized euthanasia. He clearly saw euthanasia as having "dangers [that] are concededly within the State's authority to address."[70] Justice Souter, in a telling statement, also noted that "the barrier between assisted suicide and euthanasia could become porous [if there were a right to assisted suicide], and the line between voluntary and involuntary euthanasia as well."[71] Thus, while Justice Souter was able to see many shades of gray in the assisted suicide issue, he saw euthanasia as pure darkness.

Justice Stevens distinguished between challenging a statute as facially unconstitutional and challenging the constitutionality of its application when framing the issues in the appeal,[72] stating:

> [J]ust as our conclusion that capital punishment is not always unconstitutional did not preclude later decisions holding that it is sometimes impermissibly cruel, so is it equally clear that a decision upholding a general statutory prohibition of assisted suicide does not mean that

69. *Id.* at 789.

70. *Id.* at 755.

71. *Id.* at 785.

72. *Id.* at 739-740 (Stevens, J., concurring).

> every possible application of the statute would be valid. A State, like Washington, that has authorized the death penalty, and thereby has concluded that the sanctity of human life does not require that it always be preserved, must acknowledge that *there are situations in which an interest in hastening death is legitimate. Indeed, not only is that interest sometimes legitimate, I am also convinced that there are times when it is entitled to constitutional protection.*[73]

Of all the justices, Justice Stevens' view in this and other passages came the closest to reflecting on the notion that a possible constitutional right to commit euthanasia might exist. However, we cannot forget that Justice Stevens, in fact, concurred in the majority's opinion. He readily acknowledged the majority's conclusion that there were principled reasons for "refusing to recognize an open-ended constitutional right to commit suicide," including assistance in committing suicide.[74] He also found persuasive John Donne's famous statement that "No man is an island," commenting:

> The State has an interest in preserving and fostering the benefits that every human being may provide to the community — a community that thrives on the exchange of ideas, expressions of affection, shared memories, and humorous incidents, as well as on the material contributions that its members create and support. *The value to*

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73. *Id.* at 741.

74. *Id.* at 740, 741.

> *others of a person's life is far too precious to allow the individual to claim a constitutional entitlement to complete autonomy in making a decision to end that life.*[75]

Further, Justice Stevens clearly expressed his views in the context of the right to end the life of a person for whom death is relatively imminent. In fact, after delineating the state's legitimate interests in preventing assisted suicide, Justice Stevens not only declined to say "as a categorical matter that these state interests are invalid," he made the statement with respect to "the entire class of *terminally ill,* mentally competent patients."[76] More importantly, nowhere in his concurrence did Justice Stevens consider whether a right to commit euthanasia exists. Even if in the future Justice Stevens would hold that the United States Constitution grants a right to physician-assisted suicide, it appears that he would limit the right to the terminally ill and would not extend it to euthanasia.

These five concurring justices held in common a concern that the states neither bar adequate treatment for pain and suffering in the name of prohibiting assisted suicide nor force patients to receive unwanted medical treatment. Here, defendant asserts that "no pain medication would suffice" and that "there was no other beneficial medical alternative that would have aided Thomas Youk." Defendant's own words take him well beyond the possible purview of the concurring justices in *Glucksberg*.

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75. *Id.* at 741 (emphasis added).

76. *Id.* at 750 (emphasis added).

Appendix A

(4) The "Dutch Cure"

Finally, defendant urges us to recognize that his prosecution "for helping Thomas Youk put an end to his suffering at the request of Mr. Youk" is unconstitutional on its face. He arrives at this position by asserting, first, that Youk had a constitutional right to be free from intolerable pain and, second, that defendant's provision of "Constitutionally guaranteed medical services" allows him to assert Youk's rights.

There is no authority whatsoever for the proposition that a right to be free from intolerable and irremediable suffering, if it exists, somehow migrates to an "individual," such as defendant, who provides assistance to a patient who is suffering interminably. The thin reed on which defendant apparently relies is Justice Stevens' concurrence in *Glucksberg*:

> There may be little distinction between the intent of a terminally ill patient who decides to remove her life support and one who seeks the assistance of a doctor in ending her life; in both situations, the patient is seeking to hasten a certain, impending death. The doctor's intent might also be the same in prescribing lethal medication as it is in terminating life support. A doctor who fails to administer medical treatment to one who is dying from a disease could be doing so with an intent to harm or kill that patient. Conversely, a doctor who prescribes lethal medication does not necessarily intend the

> patient's death — rather that doctor may seek simply to ease the patient's suffering and to comply with her wishes. The illusory character of any differences in intent or causation is confirmed by the fact that the American Medical Association unequivocally endorses the practice of terminal sedation — the administration of sufficient dosages of pain-killing medication to terminally ill patients to protect them from excruciating pain even when it is clear that the time of death will be advanced. The purpose of terminal sedation is to ease the suffering of the patient and comply with her wishes, and the actual cause of death is the administration of heavy doses of lethal sedatives. The same intent and causation may exist when a doctor complies with a patient's request for lethal medication to hasten her death.[77]

We first note Justice Stevens' equivocal language: "[t]here *may* be little distinction" between the intent of a terminally ill patient who decides to remove life support and one who seeks the assistance of a doctor to end her life; a doctor "*may* seek simply to ease the patient's suffering;" "[t]he same intent and causation *may* exist when a doctor complies with a patient's request for lethal medication." Such language is worlds away from a justification for euthanasia.

Second, we note that Justice Stevens' references are entirely within the context of a *doctor* treating a *patient.* Defendant is not licensed to practice medicine in Michigan.

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77. *Glucksberg, supra* at 750-751.

Therefore there was not, and could not be, a doctor-patient relationship between defendant and Youk. Defendant's argument can only be construed to mean that an *individual* can, if requested by another person, kill that person.

This is the mercy killing argument — the argument for the "Dutch cure" — taken beyond the position of even its most extreme advocates. Under defendant's theory if one who is not a doctor became convinced that one's dear friend was suffering from a painful, incurable disease and that the friend wished to die, one could at the request of that friend shoot him between the eyes with a .45 caliber pistol and not be guilty of murder. Indeed, under defendant's theory, the same result might well be obtained if one's friend were severely depressed, or perhaps simply unhappy with his lot in life. This is the slippery slope with a vengeance and we will not take a single step down it, into the abyss.

G. Conclusion

We conclude by noting that the jury, no doubt influenced by the gritty realism of the videotapes defendant made as well as his flat statement of culpability in the *60 Minutes* interview, convicted defendant of second-degree murder as well as delivery of a controlled substance. Defendant has on the record before us compared himself to Margaret Sanger, Susan B. Anthony, and Dr. Martin Luther King, Jr., all of whom risked imprisonment for their beliefs. How history will view defendant is a matter this Court can neither predict nor decide. Perhaps in the brave new world of defendant's "enlightened" society, acts such as the one he committed in this case will be excused. Still, we find it difficult to hypothesize a rule of law under which this might be so.

We deal here, however, with the application of the law as it currently exists to the facts of this case. While defendant has carefully skirted the label of murder in his past actions, he cannot do so now. Justice Levin once stated that "[Defendant] is not a murderer."[78] Here, defendant in essence convicted himself of a murder he surely committed. We will not now reverse that conviction on due process grounds. The trial court did not abuse its discretion in refusing to dismiss the charges.

IV. Defense Counsel

A. Facts And Arguments

Before trial, defendant retained Gorosh to serve as his defense attorney. However, at the December 9, 1998, preliminary examination, defendant indicated that he was waiving his right to represent himself "[a]t this hearing [.]" Consequently, Gorosh and attorney Lisa Dwyer[79] entered their appearances in the trial court on defendant's behalf. Later, however, at a proceeding in the trial court's chambers, there was some indication that defendant might seek to proceed in *propria* persona. Indeed, on March 19, 1999, Gorosh informed the trial court that he believed defendant intended to "say he's going to conduct the trial in its entirety on his own in pro per."

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78. See *Kevorkian I, supra* at 514 (Levin, J., concurring in part and dissenting in part).

79. How or why Dwyer also became defendant's attorney is not clear from the record.

In any event, while defendant did file one motion on his own behalf, it is apparent that Gorosh and Dwyer represented defendant at all times through the first day of trial on March 22, 1999. On that day, both Gorosh and Dwyer placed their appearances on the record on behalf of defendant. However, Gorosh then stated to the trial court that defendant "does want to represent himself in the trial in its entirety." In response to the trial court's questioning, defendant first stated that he was dissatisfied with Gorosh and Dwyer, prompting a colloquy in which he completely revised this statement:

> THE COURT: And do you have any reason for this dissatisfaction?
>
> [Defendant]: There's no dissatisfaction. This is what I planned all along.
>
> THE COURT: You planned all along to represent yourself?
>
> [Defendant]: To represent myself, yes.
>
> THE COURT: And so you have no independent dissatisfaction with your attorney?
>
> [Defendant]: None.

After clearing up this point, the trial court explained to defendant that he could spend the rest of his life in prison and that a criminal trial is a formal, complex, and dynamic proceeding. Further, the trial court noted, the rules of

evidence applied, as well as "certain decorum and certain ways in which there are presentations made to the jury and certain things that you can say and you can't say." The trial court asked defendant whether there was a specific reason that he wished to represent himself and he answered, "Yes."

> THE COURT: What is that, sir?
>
> [Defendant]: There are certain points I could bring out better than any attorney. Certain questions I can ask that are more pertinent.

The trial court informed defendant that, with respect to jury selection, opening statements, and closing statements, he would be bound by the rules of the court and that there would be a permanent record that might be used in other proceedings. The trial court stated that counsel could be present at the table with defendant in order to consult with, but that such advisors "can't get up and speak."

> [Defendant]: No, I said as advisors, consultation and advice. That's what I meant.
>
> THE COURT: And that's what you wish to do?
>
> [Defendant]: Yes.
>
> THE COURT: You're aware of all of these dangers?
>
> [Defendant]: Very much so.

THE COURT: You understand we're talking about something that could carry a sentence of life imprisonment without any possibility of parole?

[Defendant]: Yes.

THE COURT: And do you understand that you may not disrupt or inconvenience the Court?

[Defendant]: I'm here by my own invitation. I'll act like the guest I am.

THE COURT: And that means you will follow my orders and procedures?

[Defendant]: As a guest.

THE COURT: Well, it's more than a guest. You're here as a defendant, sir.

[Defendant]: But as a guest, propriety will be observed.

THE COURT: Has anyone promised you or threatened you in any way that makes you want to do this?

[Defendant]: No, not at all. It's my own free will.

In light of this exchange, the trial court determined that defendant had unequivocally, knowingly, intelligently, and

voluntarily waived his right to counsel. Defendant then represented himself during jury voir dire and gave his own opening statement.

On March 23, 1999, the second day of trial, before any witnesses were presented, the trial court again asked defendant if he still wished to proceed *in propria persona.* Defendant indicated that he still wished to represent himself, and did so by examining and cross-examining the witnesses. During a conference on the record in chambers on that day, the trial court again pointed out the difficulties of self-representation, to which defendant replied:

> I don't want you to agonize, I really don't. Do what you know is right, do it forcefully and definitely. It won't offend me and if you think I'm making mistakes or I don't know what I'm doing, I'll do the best I can with my advisers here. I made this choice. I don't blame anybody else, and I don't want you to agonize over it. And I don't want you to jeopardize your position.

The trial court again raised the specter of punishment with defendant:

> THE COURT: . . . I just want you to understand that if you're convicted of this offense it's the rest of your life.
>
> [Defendant]: I go to jail. I go to jail, yes. I go to jail.
>
> THE COURT: Mandatory.

[Defendant]: If I'm convicted, Your Honor, we get a shot at the Supreme Court. Not that they'll accept it, but we get a shot at it with what they want, a particularized case. They said that, we got their quotes. They want a particularized case. Four of them said we want to revisit this issue again. Now two or three years may be too quick, but when you've got someone starving to death in prison who you know is not a criminal and you know what he's doing is not a crime, maybe they'll look at it — maybe.

But if not, who cares. In 15, 20 years, they'll say well, he was right. He's dead now, but he was right. I've got to do what I know now is right and I can't let the law, which is often immoral, block me. If Margaret Sanger did that, if Susan B. Anthony did that—look at Martin — look at all these people. I'm not saying I'm like them, but they certainly — I'm certainly going to act like them. I mean, I know this is not a crime. So do you. Everybody with sense does. Your religion may say it's a sin, but that doesn't make it a crime. All these people broke the law and went to jail. I am willing to do the same.

But the Supreme Court has got to decide this on the Ninth Amendment where there is no equivocation, there is no stretching due process. They've got to do that. And if they do and break all these laws down, then we can have a better society, an honest society. I'm willing to risk that.

> Because at age of 71, I cannot go on living a hypocritical life when I can't do what I know is right, and the world knows I'm right. Everybody does. Every nation the majority is for what I'm doing. How come it's illegal? That's why I'm doing this.

On March 25, 1999, the third day of trial, defendant rested and gave his closing argument, during which he stated several times that he was acting as his own attorney. The trial court instructed the jury that defendant had a constitutional right to represent himself and that they, the jurors, must not give any negative consideration to defendant's decision to do so.

The following morning, while the jury was deliberating, defendant told the trial court that he would "take your well-advised comments and withdraw in favor of my two attorneys' advice." Gorosh, Dwyer, and defendant's appellate counsel represented him at sentencing. Subsequently, defendant moved for a new trial, alleging that he had been denied the effective assistance of counsel. The trial court denied this motion.

On appeal, defendant asserts that the trial court erred in denying his motion for a new trial because the assistance that Gorosh provided fell below the constitutional standards required for effective assistance of counsel. Defendant also asserts that the trial court erred in denying his motion for a new trial based on the doctrine of "serious mistake of counsel."

Appendix A

B. Standard Of Review And Legal Standard

We review a trial court's decision regarding a motion for a new trial for an abuse of discretion.[80] However, with respect to the underlying question whether Gorosh was ineffective, our review is de novo.[81]

As this Court explained in *People v. Knapp*:[82]

> To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for defense counsel's errors, there was a reasonable probability that the result of the proceeding would have been different. *People v. Stanaway*, 446 Mich. 643, 687-688, 521 W.W.2d 557 (1994). A defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial. *People v. Pickens*, 446 Mich. 298, 303; 521 N.W.2d 797 (1994). The defendant must also overcome the presumption that the challenged action might be considered sound trial strategy. *People v. Tommolino*, 187 Mich. App. 14, 17;

80. *People v. Leonard*, 224 Mich. App. 569, 580; 569 N.W.2d 663 (1997).

81. *People v. Toma*, 462 Mich. 281, 310; 613 N.W.2d 694 (2000).

82. *People v. Knapp*, 244 Mich. App. 361, 385-386; 624 N.W.2d 227 (2001).

466 N.W.2d 315 (1991), citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052; 80 L. Ed. 2d 674 (1984).

C. Gorosh's Representation Before March 22, 1999

(1) Overview

Defendant's briefs on appeal contain a litany of complaints aimed at Gorosh. At various places, defendant argues that Gorosh did not provide him with "appropriate advice or advocacy;" that Gorosh was "not qualified" to handle his defense; that Gorosh lacked "personal competence to handle the case;" that Gorosh "completely shut out" Dwyer; that Gorosh "prepared no defense;" that Gorosh "withheld advice during the trial in hope of causing [defendant] to feel helpless and turn over all aspects of the case to Gorosh;" that Gorosh "put his own interests ahead of those of his client;" that Gorosh "sat idly by as inappropriate comments were made in the presence of the jury;" that Gorosh "allowed the relationships among co-counsel to deteriorate to such a point that it was impossible for them to provide effective assistance to [defendant];" that Gorosh "allowed his relationship with his client . . . to deteriorate to such a point that it was impossible to provide effective assistance;" that Gorosh "did not maintain adequate communication" with defendant; and that Gorosh's behavior in the courtroom was "totally inappropriate." Indeed, at one point, defendant actually suggests that Gorosh did not allow Dwyer to sit next to defendant at trial "so that she could provide advice."

Further, defendant alleges that Gorosh threatened to tell the trial court that Dwyer's pretrial motion to quash the murder count was " ridiculous."[83]

Lost in this corrosive barrage of verbiage is the simple fact that on March 22, 1999, the relationship between defendant and Gorosh changed completely. Before March 22, Gorosh and Dwyer represented defendant as trial counsel; from March 22 through March 25, defendant represented himself with Gorosh and Dwyer serving as standby counsel. With respect to the period before March 22, as nearly as we are able to determine, defendant claims that Gorosh was ineffective because he moved to quash the assisted suicide charge and because he was unqualified and incompetent.

(2) The Motion To Quash The Assisted Suicide Charge

There is no question that Gorosh represented defendant when the defense filed a pretrial motion to dismiss the assisted suicide charge. Had the jury been presented with the assisted suicide charge and decided to convict him of that charge rather then murder, then defendant would have had a prison term no longer than four years and a fine not exceeding $2,000. By removing this charge, the jury was forced to consider convicting him of first-or second-degree murder, both of which carry much stiffer prison terms.[84]

83. Defendant relies on Dwyer's affidavit as support for this allegation. We have reviewed that affidavit and can find no such support.

84. See M.C.L. § 750.316 (mandatory life imprisonment for first-degree murder); MCL 750.317 (life in prison or any term of years for second-degree murder).

Appendix A

In denying defendant's motion for a new trial regarding this claim, the trial court stated:

> Defendant argues ineffective assistance of counsel due to trial counsel's alleged error in moving to dismiss the assisted suicide charge despite the urgings from co-counsel as well as others, to refrain from making such a motion. Defendant's argument is without merit, evidencing neither harm to Defendant nor a claim for ineffective assistance of counsel. The Court, in fact, denied counsel's motion to dismiss the assisted suicide charge in the Court's Opinion and Order dated March 9, 1999 and further, the People dismissed said charge on their own motion.

We fully agree with the trial court. Even if Gorosh performed deficiently by bringing the motion, defendant cannot demonstrate that doing so caused him any prejudice. The trial court itself protected what defendant now contends was an essential component of his defense by denying the motion. Moreover, on March 12, 1999, the *prosecutor* declined to proceed on the assisted suicide charge, pursuing only the charges of first-degree murder and delivering a controlled substance. Gorosh had no influence over the prosecutor's decision to take this action. There is no possibility that, but for Gorosh's decision to move to dismiss the assisted suicide charge, the outcome would have been different in this case.

Further, Gorosh's decision to seek dismissal of the assisted suicide charge may have been a matter of trial strategy. During the motion hearing, Gorosh argued for

dismissal of the first-degree murder charge and, in the alternative, the assisted suicide charge. Gorosh presented a lengthy and coherent argument that the first-degree murder charge should be dismissed because defendant's conduct fell within the "participation language" in the assisted suicide statute. In the alternative, he explained that if the participation language did not encompass the facts of this case, the assisted suicide charge should be dismissed. Gorosh pursued dismissal of the murder charge, which clearly was a good strategy that would have benefited defendant had it succeeded. The request to dismiss the assisted suicide charge was merely an alternative Gorosh crafted, at least in part, because of the possibility that the trial court would allow the prosecutor to proceed on the murder charge; in fact, Gorosh stated as much during the motion hearing. This Court does not substitute its judgment for counsel's judgment regarding trial strategy.[85] That the strategy Gorosh chose ultimately failed does not constitute ineffective assistance of counsel.[86]

Although defendant relies on Dwyer's affidavit averring that she urged Gorosh not to file the motion, Dwyer herself signed the pleading immediately below Gorosh's signature. Defendant also filed his own motion to dismiss all the charges against him, including the assisted suicide charge. This was, evidently, a strategy to which every member of the defense acceded. Defendant cannot now claim that this strategy denied him his right to effective assistance of counsel.

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85. See *People v. Stewart*, 219 Mich. App. 38, 42; 555 N.W.2d 715 (1996).

86. *Id.*

To allow him to do so, to use the well-worn adage, would permit him to "harbor error as an appellate parachute."[87]

(3) Gorosh's Qualifications And Competence

Defendant also claims that Gorosh was not qualified to handle his defense. In making this argument, defendant relies on the affidavits from Dwyer and Michael Schwartz, a former partner at the law firm where Gorosh was employed. According to Schwartz, Gorosh had been practicing for three years, had limited experience, and had never tried a homicide case. As defendant put it, "Gorosh was running the show, despite his lack of competence to do so alone."

This claim does not warrant a new trial on the basis of ineffective assistance of counsel. Inexperience alone is not enough to conclude that a defense counsel acted deficiently or in a manner that prejudiced the defendant. As the comment following MRPC 1.1 notes:

> A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. . . . Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

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87. *People v. Carter*, 462 Mich. 206, 214; 612 N.W.2d 144 (2000).

Indeed, Gorosh was, before this trial, associated with a law firm and lawyers who had substantial experience with this defendant and the similar prosecutions instituted against him. Further, defendant never brought any dissatisfaction with Gorosh to the trial court's attention, nor did he seek to end his relationship with Gorosh until after his sentencing. On the first day of trial after defendant indicated that he wished to represent himself, the trial court asked him whether he was dissatisfied with counsel. Defendant stated, "*There's no dissatisfaction.*" In fact, defendant said that he had "planned" to proceed in *propria persona* "all along." The trial court again asked defendant whether he was dissatisfied with counsel and he responded that he was not, but that there were certain points that he could bring out better than an attorney. Further, during jury deliberations, defendant again chose to have Gorosh represent him during sentencing. Moreover, defendant has failed to demonstrate that, but for Gorosh's alleged deficiencies, the outcome of the trial would have been different.

D. Gorosh's Representation After March 22, 1999

(1) Overview

Defendant argues that Gorosh's performance during the trial itself was so deficient and prejudicial that it constituted ineffective assistance of counsel, asserting that Gorosh was unprepared, withheld advice, ignored his wishes, "shut out" Dwyer, and was concerned only with his own reputation. Inherent in this argument is the assumption that we should evaluate Gorosh's performance as *standby* counsel in accordance with the same legal standards that we would use

in connection with the evaluation of full-blown *trial* counsel. This assumption is unwarranted. However, even if we were to apply the standards in the line of cases following *Pickens* to evaluate Gorosh's performance as standby counsel, we would still conclude that defendant was afforded the representation the constitution guarantees.

(2) The Right To Self-Representation

The United States Constitution,[88] the Michigan Constitution,[89] and M.C.L. § 763.1 each guarantee a criminal defendant the right to represent himself.[90] As the United States Supreme Court noted in *Faretta v. California*,[91] the right of self-representation is deeply rooted in English legal history:

> In the long history of British criminal jurisprudence, there was only one tribunal that ever adopted a practice of forcing counsel upon an unwilling defendant in a criminal proceeding. The tribunal was the Star Chamber. That curious institution, which flourished in the late 16th and

88. U.S. Const., Am. VI.

89. Const. 1963, art. 1, § 13.

90. See *Martinez v. Court of Appeal of California, Fourth Appellate District*, 528 U.S. 152, 154, 120 S. Ct. 684, 145 L. Ed. 2d 597 (2000); *People v. Adkins*, 452 Mich. 702, 720; 551 N.W.2d 108 (1996).

91. *Faretta v. California*, 422 U.S. 806, 821-823; 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975).

> early 17th centuries, was of mixed executive and judicial character, and characteristically departed from common-law traditions. For those reasons, and because it specialized in trying "political" offenses, the Star Chamber has for centuries symbolized disregard of basic individual rights. The Star Chamber Court not merely allowed but required defendants to have counsel. The defendant's answer to an indictment was not accepted unless it was signed by counsel. When counsel refused to sign the answer, for whatever reason, the defendant was considered to have confessed. Stephen commented on this procedure: "There is something specially repugnant to justice in using rules of practice in such a manner as to debar a prisoner from defending himself, especially when the professed object of the rules so used is to provide for his defense." The Star Chamber was swept away in 1641 by the revolutionary fever of the Long Parliament. The notion of obligatory counsel disappeared with it.[92]

In upholding a criminal defendant's right to represent himself, the Court recognized that there was a tension between the right to self-representation and the right to assistance of counsel:

> There can be no blinking the fact that the right of an accused to conduct his own defense seems

92. Citations and footnotes omitted.

> to cut against the grain of this Court's decisions holding that the Constitution requires that no accused can be convicted and imprisoned unless he has been accorded the right to the assistance of counsel. . . . For it is surely true that the basic thesis of those decisions is that the help of a lawyer is essential to assure the defendant a fair trial. And a strong argument can surely be made that the whole thrust of those decisions must inevitably lead to the conclusion that a State may constitutionally impose a lawyer upon even an unwilling defendant.
>
> But it is one thing to hold that every defendant, rich or poor, has the right to the assistance of counsel and quite another to say that a state may compel a defendant to accept a lawyer he does not want. The value of state-appointed counsel was not unappreciated by the Founders, yet the notion of compulsory counsel was utterly foreign to them. And whatever else may be said of those who wrote the Bill of Rights, surely there can be no doubt that they understood the inestimable worth of free choice.[93]

Here, defendant made a free choice to represent himself. He clearly and unequivocally waived his right to counsel. Indeed, defendant does not claim that he somehow retained his right to counsel at trial or that the trial court failed to comply with the necessary requirements regarding a proper

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93. *Id.* at 832-834 (citations omitted).

waiver. As the Court also noted in *Faretta,* a defendant who exercises the free choice to represent himself faces certain consequences:

> The right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law. Thus, whatever else may or may not be open to him on appeal, a defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of "effective assistance of counsel."[94]

Therefore, defendant cannot now suggest that his free choice to represent himself, standing alone, denied him effective assistance of counsel. As the trial court accurately put it, defendant cannot use his waiver of trial counsel as both a sword and a shield in order to achieve the outcome he desires.

(3) "Hybrid" Representation

Defendant suggests, however, that he actually proceeded with a type of "hybrid" representation. This argument is wholly unconvincing. In denying defendant's motion for a new trial, the trial court stated that it had *denied* defendant's request to proceed with a hybrid defense. In his brief defendant even acknowledges that the trial court denied this request. Further, contrary to defendant's suggestion, there is

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94. *Id.* at 835, n.46.

no constitutional right to a hybrid defense and, thus, a trial court is not required to order hybrid representation.[95]

Defendant, however, argues that "hybrid representation can be and has been allowed in appropriate situations." In support of this assertion, he cites two Michigan cases, *People v. Ramsey*[96] and *People v. Griffen*.[97] In *Ramsey,* this Court cited *Faretta* for the proposition that " 'standby' counsel may be appropriate to assist a defendant who represents himself."[98] Again referring to *Faretta*, as well as Chief Justice Burger's concurrence in *Mayberry v. Pennsylvania*,[99] this Court went on to say that "these cases do not stand for the proposition that a defendant has a right to share trial defense responsibilities with an attorney."[100] Only in a footnote did this Court suggest that hybrid representation "*might* be appropriate in some cases[.]"[101] Even then, this Court still noted that "the administrative

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95. See *McKaskle v. Wiggins*, 465 U.S. 168, 183; 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984).

96. *People v. Ramsey*, 89 Mich.App. 260; 280 N.W.2d 840 (1979).

97. *People v. Griffen*, 36 Mich. App. 368; 194 N.W.2d 104 (1971), overruled on other grounds *sub nom*, *People v. Reed*, 393 Mich. 342, 351; 224 Mich. App. 867 (1975).

98. *Ramsey, supra* at 263.

99. *Mayberry v. Pennsylvania*, 400 U.S. 455, 467-468; 91 S. Ct. 499, 27 L. Ed. 2d 532 (1971).

100. *Ramsey, supra* at 263.

101. *Id.* at 263, n.1 (emphasis added).

difficulties inherent in such a scheme are apparent."[102] Though making this vague and definitely hedged statement, this Court in *Ramsey* still affirmed the trial court's decision to deny the defendant a form of hybrid representation. This dictum in *Ramsey* provides no basis for us to conclude that the trial court erred here in denying defendant's request for hybrid representation.

The very short discussion of representation in *Griffen* provides no more support for defendant's argument. In *Griffen*, the

> [d]efendant requested that his assigned counsel be dismissed. This request was granted but at the judge's request, counsel remained to help defendant if needed. Counsel conducted the *voir dire* examination of the jury and cross-examined some witnesses. Defendant's claim of reversible error because he was denied his right to proceed *in propria persona* is not sustained on this record.[103]

Thus, *Griffen* stands for the negative proposition that allowing hybrid representation does not compromise a defendant's right to proceed *in propria persona*. It certainly does not stand for the affirmative proposition that a failure to allow hybrid representation constitutes reversible terror.

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102. *Id.*

103. *Griffen, supra* at 372.

Defendant fares no better in citing federal precedent. He refers us to *United States v. Hill*[104] and to *United States v. Tutino*.[105] In *Hill*, the United States Court of Appeals for the Tenth Circuit interpreted numerous federal opinions as "not foreclos[ing] a trial judge from allowing hybrid representation in appropriate cases; rather, they indicate *no right to hybrid representation exists*."[106] In *Tutino*, the Court wrote that "[t]he decision to grant or deny 'hybrid representation' lies solely within the discretion of the trial court." *Tutino*, which explicitly noted "that a criminal defendant has no constitutional or statutory right to represent himself as co-counsel with his own attorney," plainly did not reach the holding defendant wishes us to reach in this case.[107] Whatever "appropriate" circumstances might explain a trial court's decision to allow defendant to proceed with hybrid representation, defendant has failed to demonstrate that they existed here.

(4) Standby Counsel

Defendant also claims that he was denied the effective assistance of counsel when Gorosh functioned as standby counsel. A defendant who asserts his right to self-representation has no absolute entitlement to standby

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104. *United States v. Hill*, 526 F.2d 1019 (C.A. 10, 1975).

105. *United States v. Tutino*, 883 F.2d 1125 (1989).

106. *Hill*, *supra* (emphasis added).

107. *Tutino*, *supra*.

counsel.[108] As the Michigan Supreme Court explained in *People v. Dennany*,[109] "[A] defendant has a constitutional entitlement to represent himself or to be represented by counsel — but not both." Consequently, the Court held in *Dennany* that Const. 1963, art. 1, § 13, "permits the use of standby counsel as a matter of grace, but not as a matter of right."[110]

The defendant in *McKaskle v. Wiggins*[111] placed the proper role of standby counsel squarely in front of the United States Supreme Court. In *McKaskle*, defendant Carl Wiggins vacillated between asserting his right to represent himself and his right to assistance of counsel at both of his trials.[112] On appeal, Wiggins claimed that his standby counsel impinged on his right to present his own defense, as *Faretta* guaranteed.[113] As Justice O'Connor put it, Wiggins contended that his right to represent himself "was impaired by the distracting, intrusive, and unsolicited participation of counsel throughout the trial."[114]

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108. See *People v. Davis*, 216 Mich. App. 47, 55-56, 549 N.W.2d 1 (1996).

109. See *People v. Dennany*, 445 Mich. 412, 442; 519 N.W.2d 128 (1994).

110. *Id.*

111. *McKaskle, supra.*

112. *Id.* at 170-173.

113. *Id.* at 173.

114. *Id.* at 176.

The Court agreed with Wiggins' underlying premise that a defendant who represents himself "must be allowed to control the organization and content of his own defense, to make motions, to argue points of law, to participate in voir dire, to question witnesses, and to address the court and the jury at appropriate points in the trial."[115] However, the Court concluded that Wiggins had been "accorded all of these rights."[116] Further, the Court noted that the right to self-representation "must impose some limits on the extent of standby counsel's unsolicited participation."[117] Consequently, the Court held that a defendant who represents himself "is entitled to preserve actual control over the case he chooses to present to the jury" and that "participation by standby counsel without the defendant's consent should not be allowed to destroy the jury's perception that the defendant is representing himself."[118]

Applying its holding to the facts of the case, the Court noted that the performance of Wiggins' standby counsel "should not serve as a model for future trials," but nevertheless determined that standby counsel's participation at trial "fell short of infringing on Wiggins' *Faretta* rights."[119] In essence, the Court held that while the standby counsel may have been rather assertive and somewhat obnoxious, he did not do *too much*.

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115. *Id.* at 174.

116. *Id.*

117. *Id.* at 177.

118. *Id.* at 178.

119. *Id.* at 186.

Here, defendant asserts the opposite. He claims that Gorosh did *too little*. Defendant placed himself in the unenviable position of suggesting that, in light of his own inadequacies in representing himself at trial, Gorosh should have done *more* to help him. *McKaskle* stands for the proposition that a defendant who represents himself is entitled to maintain actual control over the case, which standby counsel cannot destroy by altering the jury's perception that the defendant is representing himself. In other words, "the right to appear *pro se* can lose much of its importance if only the lawyers in the courtroom know that the right is being exercised."[120] Conceptually, it is difficult to conceive of a situation in which a reticent, rather than an assertive, standby counsel could wander into either of these two protected areas. In the absence of a right to standby counsel or even a right to hybrid representation, *McKaskle* provides an intellectual foundation for the proposition that a defendant who chooses to represent himself does so at his own peril. With no constitutional right to an attorney, a defendant proceeding *in propria persona* has no basis to claim that the attorney must abide by constitutional standards.

Two federal opinions support this view. In *United States v. Schmidt*,[121] the defendant claimed that the attorney appointed to serve as standby counsel at trial was "so deficient and prejudicial to her that it constituted ineffective assistance of counsel."[122] This was a mirror image of the argument in

120. *Id.* at 179.

121. *United States v. Schmidt*, 105 F.3d 82 (C.A. 2, 1997).

122. *Id.* at 89.

McKaskle; the defendant in *Schmidt* asserted that her attorney did *too little* rather than *too much.* The *Schmidt* Court rejected this argument for three reasons. First, the defendant had waived her right to counsel when she asserted her right to represent herself.[123] Second, the defendant did not have the right to hybrid counsel.[124] Rather, "[a]bsent a constitutional right to standby counsel, a defendant cannot prove standby counsel was ineffective."[125] As the Court remarked:

> As might be expected, a standby counsel's duties are considerably more limited than the obligations of retained or appointed counsel. . . . Although [the defendant's standby counsel's] role expanded as the case continued, he did not play the same role that defense counsel normally would in preparing the strategy for a criminal defense. Perhaps in a case where standby counsel held that title in name only and, in fact, acted as the defendant's lawyer throughout the proceedings, we would consider a claim of ineffective assistance of standby counsel. *This is not such a case. Because* [the defendant] *proceeded pro se, she may not now assign blame for her conviction to standby counsel.*[126]

123. *Id.* at 90.

124. *Id.* at 90, citing *United States v. Cochrane*, 985 F.2d 1027, 1029 & n.1 (C.A. 9, 1993), and *United States v. Windsor*, 981 F.2d 943, 947 (C.A. 7, 1992).

125. *Schmidt, supra* at 90.

126. *Id.* (citations omitted and emphasis added).

Third, the court concluded that even if the traditional test of ineffective assistance of counsel applied, the defendant's standby attorney passed the constitutional threshold for performance and there was no evidence of prejudice.[127]

The more recent decision in *United States v. Morrison*[128] interpreted *Schmidt*:

> As we held in *Schmidt*, without a constitutional right to standby counsel, a defendant is not entitled to relief for the ineffectiveness of standby counsel. While we stated in *Schmidt* that we might entertain a claim for ineffective assistance of standby counsel if standby counsel "held that title in name only and, in fact, acted as the defendant's lawyer throughout the proceedings," the record indicates that Morrison retained control of his own defense throughout the proceedings, so that his standby counsel was in reality, as well as in name, only that.

Going one small step beyond *Schmidt*, the court in *Morrison* concluded that this rule of law did not require the additional, and therefore superfluous, process of determining whether standby counsel was effective.

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127. *Id.* at 90-91.

128. *United States v. Morrison*, 153 F.3d 34 (C.A.2, 1998).

We find this reasoning in *Schmidt* and *Morrison* persuasive. From March 22 through March 25, defendant represented himself. During this time, Gorosh was his standby counsel in reality as well as in name. Because defendant chose to represent himself during this period, he may not now assign blame for his conviction to Gorosh. Further, Gorosh did nothing to interfere with defendant's right to control the case or to alter the jury's perception that he was representing himself. In short, during this period, Gorosh was not acting as counsel within the meaning of the Sixth Amendment or Const. 1963, art. 1, § 13 and, therefore, cannot be held to the standards of effective assistance required of trial counsel. In any event, Gorosh's performance as standby counsel did not fall below an objective standard of reasonableness and defendant has made no showing that, but for Gorosh's alleged errors, the result of the proceedings would have been different.

E. The "Serious Mistake" Doctrine

Defendant claims that he is entitled to a new trial under the common law "serious mistake" standard for evaluating ineffective assistance of counsel claims. Substantively, he claims that Gorosh's failures, described in his traditional ineffective assistance of counsel argument, also constituted a violation of this serious mistake doctrine. The cases defendant cites[129] as announcing this serious mistake doctrine

129. See *People v. Sealy*, 136 Mich.App. 168, 175-176; 356 N.W.2d 614 (1984), *People v. Brady Smith*, 108 Mich. 338, 343; 310 N.W.2d 235 (1981), and *People v. Lotter*, 103 Mich. App. 386, 389; 302 N.W.2d 879 (1981).

rely on *People v. Garcia.*[130] In *Garcia,*[131] the Michigan Supreme Court relied on the statement in *People v. DeGraffenreid*[132] that

> [a] claim that an adequate lawyer made a serious mistake does not raise the constitutional issue of the right to counsel; it does not involve the concept of "effective assistance of counsel," it should not be measured against the sham trial standard which circumscribes the constitutional right.

Thus, the Court in *Garcia* held that

> even where assistance of counsel satisfies the constitutional requirements, defendant is still entitled to a fair trial. Defendant can be denied this right if his attorney makes a serious mistake. But a courts should not grant a new trial unless it finds that but for this mistake defendant would have had a reasonably likely chance of acquittal.[133]

Subsequently, the United States Supreme Court set forth the federal standard for determining whether a defendant received the effective assistance of counsel in *Strickland,*

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130. *People v. Garcia,* 398 Mich. 250, 266; 247 N.W.2d 547 (1976).

131. *Id.* at 266.

132. *People v. DeGraffenreid,* 19 Mich. App. 702, 717; 173 N.W.2d 317 (1969).

133. *Garcia, supra* at 266.

supra, which the Michigan Supreme Court adopted in *Pickens*.[134] Having moved away from the "sham trial" test previously used to analyze effective assistance of counsel claims, which was the basis for the comment in *DeGraffenreid* regarding an attorney's serious mistake,[135] the *Pickens* Court reexamined *Garcia*:

> Our Court of Appeals . . . has interpreted this Court's decision in *Garcia* as requiring the reversal of a conviction even if defense counsel's ineffective assistance did not prejudice the defendant. While we recognize that the opinion is less than a model of clarity and might be so interpreted, federal law does not mandate such a procedure. *Garcia* essentially relied on Sixth and Fourteenth Amendment jurisprudence, and did not formulate the standard from the intentions, history, or common law undergirding the Michigan Constitution. *Garcia*, therefore, does not stand for the proposition that the Michigan Constitution was intended to grant stronger protections than federal authority with regard to the standards applied to the issue of ineffective assistance of counsel.[136]

Thus, in *Pickens*, the Michigan Supreme Court put to rest any notion that there is an alternative, common-law test for effective assistance of counsel. Again, defendant has failed

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134. *Pickens*, *supra* at 326-327.

135. *DeGraffenreid*, *supra* at 717.

136. *Pickens*, *supra* at 312-313 (footnote omitted).

to provide any persuasive authority to disprove this clear decision in *Pickens*, which excuses us from engaging in an exhaustive search of our own.[137] As the First Circuit so aptly put it, "It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on the bones."[138] Moreover, even if there were such a standard for an attorney's conduct, the same flaws in defendant's reasoning concerning Gorosh's performance apply in this context, especially because he wholly relies on his arguments concerning ineffective assistance to outline what he considers serious mistakes. Thus, there is no merit to this issue.

V. Defendant's Closing Statement

A. Facts And Argument

Defendant gave his own closing argument to the jury on March 25, 1999. Although he did not testify at the trial, at several points in his closing argument defendant injected what would appear to be first-person testimony:

> [Defendant]: Next time he [the prosecutor] uses the word "kill" or "murder" please ask yourselves, please — why? Did you ever ask him why I did that, why I did this act he calls killing? He says just to murder Thomas Youk that's all, to kill him. . . . Next time he [sic] you hear him utter kill, say why, and when.

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137. See *Mitcham*, *supra*.

138. *United States v. Zannino*, 895 F.2d 1, 17 (C.A. 1, 1990).

Why then? Why on the 17th of September? Why not a month earlier or three years earlier? Ask him why not earlier didn't he call me to kill him. Those are unanswerable questions. He can't answer those. Why did Tom Youk call name on the 15th of [sic] 16th? Why did he call me? Because he had —

[Prosecutor]: Well, objection, Judge. He can't testify now. He can't tell the facts now. That portion's over.

THE COURT: You have something in evidence. We don't know whether he's going to talk about what's in evidence.

* * *

[Defendant]: I staged the whole thing. Really. I'm not much of a producer or a director in movies. We — I wanted to protect the family from possible charges —

[Prosecutor]: Objection, objection. Again, he's testifying. He can't put facts into —

[Defendant]: I'm trying to show why I did it.

* * *

[Prosecutor]: He cannot put facts before the jury which might not have been proven before or through testimony or other evidence. He cannot testify now.

* * *

[Defendant]: There were no witnesses there. Now can I say why?

[Prosecutor]: I'm objecting.

THE COURT: Well, sir, it depends on how you phrase it.

[Defendant]: There were no witnesses there because I didn't want anyone else —

[Prosecutor]: Objection.

[Defendant]: — implicated.

[Prosecutor]: Objection.

[Defendant]: Well, that's — can I say why?

[Prosecutor]: Judge, you know, he could have gotten on — you know, he didn't —

* * *

[Prosecutor]: — He didn't – he can't testify now. He cannot testify now.

[Defendant]: Why — why I took so much time with the needle down here. Can I say that?

THE COURT: You can comment about what is in evidence. You can comment about what is on the tape.

[Defendant]: I took my time down here in this one vein, trying to get a small vein, trying to keep —

[Prosecutor]: Your Honor, I'm going to object again. He's now testifying. He's putting new facts before the jury. He can't do that.

[Defendant]: Okay. The covering up of the needle sticks was to try to keep this —

[Prosecutor]: Objection.

[Defendant]: Well, you talked about the needle sticks.

[Prosecutor]: You can't say — Judge, he's giving reasons for these things. That has to come through testimony. It can't be presented through his closing argument to the jury.

THE COURT: You may make argument about what they saw, but you can't introduce something new. Okay?

[Defendant]: After they saw the slip of paper on the floor with my name on it, this became known. It became known. Why didn't I come forward immediately after I did it? It became known only after they discovered my name on it and then I know — everyone knew it would become known. It wasn't done for staging, it wasn't done to show. It wasn't videotaped for that purpose. And why was a narration, which he brings up? Can I give reasons for the narration?

[Prosecutor]: I object.

* * *

[Defendant]: That's the implication given by the prosecutors and other — other antagonists, implying that it's very cursory, that I don't really know these patients, I don't know anything about them. No doctor who's got integrity and is competent would proceed without definitive medical information on the patient. The only point is they don't have that information. I do.

[Prosecutor]: Well, objection. The jury doesn't have that, either. Again, I'm going to object to him putting in facts that didn't come in during trial.

> THE COURT: Let's see if we can break this down. You may comment about anything that's in evidence. You may not comment about anything he said. You just can't introduce something.

The next day, while the jury was deliberating, defendant moved for a mistrial on the basis of the prosecutor's comments. The trial court denied the motion.

Defendant now contends that the prosecutor, while objecting to his closing arguments, improperly referred to defendant's decision to exercise his right to remain silent several times. Although defendant later moved for a mistrial, he failed to object to the prosecutor's comments at the time the prosecutor made them. According to Gorosh, this was a calculated decision not "to disrupt the flow of closing" and an effort "to get a copy of the transcript" of the prosecutor's comments to be used for the motion for a mistrial.

B. Preservation And Standard Of Review

Defendant failed to preserve this issue for appeal by objecting to the prosecutor's allegedly improper comments in a timely fashion.[139] Accordingly, our review is limited to determining whether the comments were plain error that affected defendant's substantial rights.[140]

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139. See *People v. Schutte*, 240 Mich. App. 713, 720; 613 N.W.2d 370 (2000).

140. See *People v. Carines*, 460 Mich. 750, 761-762; 597 N.W.2d 130 (1999).

C. Right Not To Testify

Neither a prosecutor nor the trial court may comment on a defendant's decision to exercise his constitutional right not to testify.[141] Published state precedent does not address the precise situation presented in this case.The cases that defendant cites are distinguishable because they do not involve a defendant who proceeded *in propria persona.* However, *People v. Marcus Jones*[142] is instructive.

In *Marcus Jones,* while the prosecutor was giving his closing argument to the jury, the prosecutor described a piece of trial testimony, prompting the defendant to interject, "They didn't say that."[143] The trial court admonished the defendant, stating, "If you want to testify, sir, your chance to do that is over with you [sic]. You can't sit there — listen Mister — you had an opportunity to testify. You can't testify now."[144] Defense counsel then objected, prompting the trial court to ask, "Objection to what? He's out now speaking, [defense counsel] [sic]. He had that opportunity. The jury knows that. He can't have it both ways, sir."[145]

141. See *Griffin v. California*, 380 U.S. 609, 615, 85 S. Ct. 1229, 14 L.Ed.2d 106 (1965); *People v. Fields*, 450 Mich. 94, 108-109, 538 N.W.2d 356 (1995).

142. *People v. Marcus Jones*, 442 Mich. 893, 499 N.W.2d 344 (1993).

143. *Id.* at 893.

144. *Id.*

145. *Id.* at 894.

Appendix A

Though this Court reversed the defendant's conviction in *Marcus Jones*, the Michigan Supreme Court peremptorily reversed this Court.[146] After acknowledging that "neither the prosecutor nor the trial court may comment on the defendant's exercise of his constitutional right not to testify," the Supreme Court nevertheless concluded that the trial court's remarks were a proper response to the defendant's interruption. Further, the Court noted, "[t]hough awkwardly phrased, the judge's statements were consistent with his obligation to maintain orderly proceedings and proper decorum in the courtroom."[147] Finally, the Court concluded that the defendant was not entitled to a new trial, having not been denied a fair trial in the first instance.[148]

The Mississippi Supreme Court reached a similar conclusion in *Larry Jones v. State*.[149] The defendant in *Larry Jones* did not testify during trial, but chose to argue the sentencing phase of his capital murder prosecution.[150] During his argument, the defendant referred to facts that were not in evidence.[151] Consequently, the prosecutor objected in the presence of the jury:

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146. *Id.* at 893.

147. *Id.*

148. *Id.*

149. *Larry Jones v. State*, 381 So.2d 983 (Miss., 1980).

150. See *id.* at 993.

151. *Id.* at 997.

> That's testifying and there's no way to contradict that and it's not fair, Judge, if he doesn't take the stand and let the State cross examine him on this but to stand up here and to be able to do something that the State does not have a right to cross examine him on is not proper. . . . The State didn't have a right to call him, Judge. We couldn't put him on the stand.[152]

The Mississippi Supreme Court acknowledged that defendants must make a difficult choice between arguing their own case and invoking the right not to testify.[153] However, the Court remarked that

> [a] criminal defendant who takes advantage of his right to argue his case to the jury must not be permitted to say all the things he might have testified to had he chosen to call himself as a witness. When he does so, he will be deemed to have waived the right not to have his failure to take the stand commented upon.[154]

Though the court noted that a defendant representing himself still had to follow the court rules, it nevertheless indicated that trial courts should give these defendants some "leeway" in arguing their case.[155] However, the court cautioned,

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152. *Id.* at 998.

153. *Id.* at 993.

154. *Id.*

155. *Id.* at 993-994.

> in those instances where a defendant, arguing *pro se*, clearly goes beyond the evidence in the record on a material point, as he did in this case, he must accept as a consequence the prosecution's comment on his failure to swear to the testimony. The defendant's remarks in this case cannot be dismissed as a failure to grasp "legal niceties." They are unsworn testimony, and as such, constitute a partial waiver of the constitutional privilege against self-incrimination and the prohibition against a district attorney from commenting on his not taking the stand.
>
> We do not say that every defendant who argues *pro se* loses the privilege against prosecutorial comment on his failure to testify. Only when the defendant's remarks go beyond the evidence does he waive this privilege.[156]

Thus, as did the Michigan Supreme Court in *Marcus Jones*, the Mississippi Supreme Court in *Larry Jones* concluded that there was no error requiring reversal because "defendant's own statements which were exculpatory and self-serving in nature, not under oath and not supported by the record," prompted the prosecutor to make the comment at issue.[157]

The Missouri Supreme Court used a variation of this "proper response" rationale in *State v. Brannson*[158] to reject the defendant's contention that the prosecutor's objections

156. *Id.* at 994.

157. *Id.* at 993.

158. *State v. Brannson*, 679 S.W.2d 246 (Mo., 1984).

and remarks improperly referred to his decision not to testify though proceeding *in propria persona.* Describing the context in which the references to the defendant's decision not to testify arose, the *Brannson* Court explained:

> This is not a case in which a defendant sits mute at counsel table and the prosecution points up the defendant's failure to testify. On the contrary, this is a case in which defendant undertook his own defense and during his protracted trial participation effectively injected himself into the mainstream of the evidence. He attempted not only to argue the various points in issue but in the presentation of evidence through his lengthy interrogation of the State's witnesses, sought repeatedly to state as facts items not otherwise in evidence and in certain instances to establish as fact matters of which the witnesses had no knowledge. Clearly these were points which defendant considered vital to his case and on which he was apparently otherwise unable or unwilling to obtain proof. In effect he was attempting in that manner to testify to these otherwise unproved "facts." The objections of the prosecutor to those attempts of defendant, some of which were successful, some not, accurately pointed out what defendant was trying to do — and lodged the objections in those terms (*e.g.*, defendant "is attempting to testify to that." "He's trying to testify." "Defendant is again trying to testify."). The objections went to the form of the questions and in several instances were

> sustained. . . . [T]his is not a case in which defendant failed or refused to testify and in which comment was made on that fact. Indeed it is the opposite. Defendant sought in the jury's presence to state as evidence matters not in proof and in so doing he sought to testify without having been sworn and the prosecutor objected for that reason in those terms.[159]

The *Brannson* court then described a rule that was easy to apply:

> The orthodox standard prohibiting comment by the prosecution on the failure of the accused to testify is applicable when the accused is silent, but when the accused conducts his own defense and attempts — innocently or otherwise — to testify or to inject facts not in evidence into the case, a different problem arises. For then it is defendant's "attempt to testify" to which objection is made.[160]

Without a "direct and unequivocal" reference to the defendant's right not to testify, the Court held that there was no error requiring reversal.

Here, the prosecutor's objection to defendant's failure to testify fits squarely within the reasoning of both *Jones* cases and *Brannson*. Defendant's decision to testify to the

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159. *Id.* at 249 (citations omitted).

160. *Id.* at 250.

jury in closing arguments rather than commenting on the evidence admitted at trial prompted the prosecutor's response. Defendant's comments can only be characterized as repeated and improper attempts to present the jury with facts not in evidence. The prosecutor's comments were properly focused on preventing defendant from continuing down this wrong path. The prosecutor's comments certainly were not the sort of "direct and unequivocal" reference the Court in *Brannson* would have found plain error requiring reversal. To defendant's benefit, the trial court also instructed the jury that every defendant has an absolute right not to testify, that they must not consider the fact that defendant did not testify, and that this fact must not affect their verdict in any way. In sum, given the circumstances of this case, we conclude that defendant has failed to demonstrate a plain error requiring reversal. We note that our conclusion does not hinge, as did the Mississippi Supreme Court's decision in *Larry Jones*, on the notion that the defendant partially waived his constitutional privilege against self-incrimination when his remarks went beyond the evidence. We simply conclude that the prosecutor's objections and comments did not constitute direct and unequivocal references to defendant's failure to testify. Rather, they merely amounted to objections to defendant's repeated and improper attempts to inject facts not in evidence into his closing statement.

Appendix A

VI. Testimony of Terrence And Melody Youk

A. Facts And Argument

Before trial, the prosecutor moved to preclude defendant from asserting the defenses of consent and euthanasia, any irrelevant testimony regarding Youk's medical condition, pain and suffering, and quality of life, and to prevent a jury nullification argument. In its opinion and order, the trial court granted the prosecutor's motions, but allowed evidence of Youk's pain and suffering and quality of life as it related to the assisted suicide charge that was still pending at that time. When the prosecutor decided not to pursue the assisted suicide charge, defendant asked the trial court to reconsider its decision to exclude evidence of Youk's pain and suffering, among other things. The trial court denied this motion.

When defendant submitted his witness list, however, it listed Melody and Terrence Youk. The trial court instructed defendant that he needed to make an offer of proof concerning the two witnesses. On the second day of trial, defendant made an offer of proof indicating that Terrence Youk would testify that defendant did not intend to murder Youk. With regard to Melody Youk, defendant indicated that her testimony was relevant to Youk's background and his own intent.

The trial court made a special record regarding defendant's offer of proof. Melody Youk testified that when she met with defendant, she explained Youk's condition, and she indicated that they understood that defendant may be able

to "assist [them] in relieving his pain and suffering." According to Melody Youk, in a subsequent conversation, she, Terrence Youk, and defendant discussed what defendant could do "to bring an end to this situation."

Defendant argued that Melody Youk's testimony was relevant to establish Youk's state of mind and defendant's perception. In response, the prosecutor argued that Melody Youk's testimony related to consent and euthanasia, which were not recognized defenses to murder, and that Melody Youk's testimony did not concern defendant's state of mind. The trial court then allowed defendant to question Melody Youk further. She testified that she never told defendant that her intent was to have defendant kill Youk and that they never discussed the words "kill or murder." Defendant again argued that Melody Youk's testimony was relevant to show that he did not intend to kill Youk.

Following arguments of the parties, the trial court ruled that Melody Youk's testimony was not appropriate. The trial court stated that defendant was attempting to introduce evidence of a mercy killing, which is not cognizable under state laws, and that his proffered evidence related to the law and a legal argument or debate, which do not go before a jury. The trial court also stated that the fact that Melody Youk did not want defendant to "do something" was not relevant to defendant's state of mind. The trial court reiterated that any consent to defendant's action was irrelevant.

With regard to Terrence Youk's testimony, defendant argued that he had a constitutional right to kill a patient.

The trial court ultimately ruled that Terrence Youk's proposed testimony was hearsay and irrelevant. The issue was again raised during defendant's motion for bond pending appeal and the trial court again ruled that the offer of proofs indicated that the witnesses would only testify concerning euthanasia and consent, which were not legally cognizable defenses.

Defendant now argues that the trial court erred when it barred him from calling Terrence and Melody Youk to testify at trial. Defendant contends that Terrence and Melody Youk were *res gestae* witnesses because they were listed on the police report and were familiar with certain circumstances surrounding Youk's death. Further, defendant asserts, Terrence and Melody Youk could have testified about Youk's death, the effect of his disease, his daily life conditions, and his consent, as well as rebutting the prosecutor's argument that defendant's purpose was to seek publicity and to advance his own agenda.

B. Standard Of Review

The trial court has discretion when considering whether to admit evidence.[161] Thus, we review the trial court's decision to exclude this evidence for an abuse of that discretion.[162]

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161. *People v. Starr*, 457 Mich. 490, 494; 577 N.W.2d 673 (1998).

162. *Id.*

Appendix A

C. *Res Gestae* Witnesses

Defendant states that because Terrence and Melody Youk were *res gestae* witnesses, "the Prosecutor himself was obligated to call [them] to the stand." In making this claim, defendant apparently relies on M.C.L. § 767.40a[163] as it appeared before the Legislature amended it in 1986,[164] as well as the cases interpreting that former version of the statute. However, under the current version of the statute, the prosecutor no longer has a duty to produce *res gestae* witnesses.[165] Instead, the prosecutor has a continuing duty to advise the defense of all *res gestae* witnesses that the prosecution intends to produce at trial.[166] "Put in other terms, the prosecutor's duty to provide *res gestae* witnesses was replaced with the duty to provide notice of known witnesses and to give reasonable assistance in the locating of witnesses if a defendant requests such assistance."[167] Thus, even if Terrence and Melody Youk could be considered *res gestae* witnesses, the prosecutor had no duty to produce them to testify.

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163. 1941 PA 336.

164. 1986 PA 46.

165. See *People v. Burwick*, 450 Mich. 281, 298; 537 N.W.2d 813 (1995).

166. See *Snider*, *supra* at 423.

167. *Id.*

Appendix A

D. Relevance

We have a separate, and further, rationale for affirming the trial court's decision to exclude this evidence. As the trial court noted repeatedly, the two witnesses simply had no relevant testimony to offer to the jury. " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is *of consequence to the determination of the action* more probable or less probable than it would be without the evidence."[168] A variety of factors, including the elements of the charged crimes, the theories of admissibility, and the defenses asserted all help determine whether any particular piece of evidence is relevant.[169]

The testimony Terrence and Melody Youk would have provided to the jury concerned Youk's medical condition, pain, suffering, and the conditions of his daily life, as well as his consent. By proffering such evidence, defendant sought to justify killing Youk. In fact, although defendant claims that he proffered their testimony for other reasons, the crux of his claims consistently relate to consent and euthanasia. Simply put, consent and euthanasia are not recognized defenses to murder. As the trial court noted, "[a] trial court may exclude from the jury testimony concerning a defense that has not been recognized by the Legislature as a defense to the charged crime."[170] Thus, Terrence and Melody Youk's

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168. MRE 401.

169. *People v. Brooks*, 453 Mich. 511, 517-518; 557 N.W.2d 106 (1996), quoting *People v. Mills*, 450 Mich. 61, 67-68; 537 N.W.2d 909 (1995).

170. *People v. Demers*, 195 Mich. App. 205, 207; 489 N.W.2d 173 (1992).

testimony was inconsequential to the determination of this case.

Within this issue, defendant also suggests that he was prejudiced because the prosecutor discussed "lack of consent" and defendant's political and personal agenda. Defendant asserts that the testimony of Terrence and Melody Youk could have contradicted those claims. This argument is entirely unpersuasive. The trial court allowed defendant to argue that Youk consented to defendant's actions. Further, the jury saw the videotape of Youk consenting to defendant's actions. Similarly, defendant himself stated on the videotape and in his closing argument to the jury that his motive in killing Youk was to relieve Youk's pain and suffering and to bring the issue of euthanasia to the forefront. Accordingly, we conclude that the trial court did not abuse its discretion in precluding Terrence and Melody Youk from testifying.

Affirmed.

/s/ William C. Whitbeck
/s/ Joel P. Hoekstra
/s/ Henry William Saad

APPENDIX B — OPINION AND ORDER OF THE CIRCUIT COURT OF THE STATE OF MICHIGAN FOR THE COUNTY OF OAKLAND DATED JULY 15, 1999

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

Case No. 98-163675-FC

Hon. Jessica R. Cooper

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

v.

JACK KEVORKIAN,

Defendant.

This matter is before the Court on Defendant, Jack Kevorkian's, motion for new trial. Pursuant to MCR 2.119(E)(3), there will be no oral arguments.

On December 9, 1998, the People charged Defendant with first degree murder, in violation of MCL 750.316; MSA 28.548, criminal assistance to suicide, in violation of MCL 750.329a; MSA 28.561a and delivery of a con-trolled substance, in violation of MCL 333.7401(2)(b);

MSA 14.15(7401)(2)(b).[1] On March 26, 1999, following a trial by jury, Defendant was convicted of second degree murder, contrary to MCL 750.317; MSA 28.549, and delivery of a controlled substance, contrary to MCL 333.7401(2)(b); MSA 14.15(7401)(2)(b). Thereafter, on April 13, 1999, this Court sentenced Defendant to ten (10) to twenty-five (25) years imprisonment for the murder conviction as well as three (3) to seven (7) years Imprisonment for the delivery of a controlled substance conviction, concurrently to be served.

On May 21, 1999, Defendant filed the instant motion for new trial, pursuant to MCR 6.431. The applicable Michigan Court Rule provides that, upon the defendant's motion, a court may grant the defendant a new trial on any ground, which would support appellate reversal of the conviction, or if the court believes that the verdict resulted in a miscarriage of justice. MCR 6.431(B).

Defendant brought his motion for new trial premised upon two (2) arguments; first, that Defendant was denied his constitutional right to effective assistance of counsel under the United States and Michigan Constitutions, US Const, Am VI and Const 1963, art 1, § 20, and, second, that Defendant's trial counsel made serious errors, which denied him of his right to a fair trial under Michigan common law.

Although the Michigan Constitution as well as state statutory law affords a defendant of the right to proceed *in propria persona*, a defendant has either the right to counsel

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1. The People subsequently moved to dismiss the criminal assistance to suicide charge, MCL 750.329a; MSA 28.561a, which the Court granted on March 12, 1999.

or to self-representation, *not* both. *People v Adkins*, *452* Mich 702, 720; 551 NW2d 108 (1996), *reh den* 453 Mich 1205; 554 NW2d 12 (1996). Pursuant to *Adkins*, this Court exercised its discretion and declined to allow hybrid representation of the Defendant in this proceeding, at which time the Defendant requested to proceed as counsel on his own behalf.

Michigan case law provides that, upon a defendant's request to dismiss retained counsel and proceed *in propria persona*, the court must determine: (1) whether the request is unequivocal, (2) whether the defendant is asserting his right knowingly, intelligently and voluntarily and (3) that the defendant will not disrupt, unduly inconvenience and burden the court as well as the administration of the court's business. *People v. Anderson*, 398 Mich 361, 367-68; 247 NW2d 857 (1976). The Court, in fact, addressed each of the aforementioned requirements and thoroughly reviewed with the Defendant the dangers and disadvantages of self-representation. Prior to granting the Defendant's request to proceed on his own behalf, as set forth in *Anderson*, this Court determined that the Defendant clearly and unequivocally requested to the Court to proceed in *propria persona*, knowingly, intelligently and voluntarily waiving his right to be represented by trial counsel.

Assuming *arguendo* the truthfulness of the allegations contained in Defendant's motion as well as the supporting affidavits, this Court denies Defendant's motion for new trial. Defendant alleges numerous mistakes and/or other errors in judgment with regard to trial counsel, David Gorosh's, representation of Defendant, prior to Defendant's waiver of his right to counsel on the day of trial. This Court finds that

the allegations complained of do not support reversal of the conviction, or demonstrate that the verdict resulted in a miscarriage of justice. MCR 6.431(B).

First and foremost, the Constitutions of the United States and the State of Michigan guarantee the Defendant's right to retain the trial counsel of his choice. *People v Crawford*, 147 Mich App 244, 247; 383 NW2d 172 (1985); US Const Am VI; Const 1963, art 1, § 20. Defendant argues ineffective assistance of counsel as a result of an alleged collapse of the attorney/client relationship between the Defendant and Mr. Gorosh. The fact of the matter remains that Defendant personally chose and retained Mr. Gorosh to represent him on his own behalf. As such, any alleged discord between the parties could have been rectified at any given time by the Defendant's termination of said representation.

Secondly, Defendant bases his motion for new trial upon the fact that Mr. Gorosh failed to effectively advocate to allow trial testimony as to Thomas Youk's medical condition, pain and suffering, conditions of daily living and/or quality of life, which testimony Defendant believed to be crucial to his defense. Defendant's argument lacks merit. The Defendant, *via* counsel, is prohibited from putting forth a defense, which is not a defense cognizable under the laws of the State of Michigan, in order to elicit jury nullification. *People v Demers*, 195 Mich App 205, 208; 489 NW2d 173 (1992), *lv den* 442 Mich 898; 502 NW2d 43 (1993).

Finally, Defendant argues ineffective assistance of counsel due to trial counsel's alleged error in moving to dismiss the assisted suicide charge despite the urgings from co-counsel

as well as others, to refrain from making such a motion. Defendant's argument is without merit, evidencing neither harm to the Defendant nor a claim for ineffective assistance of counsel. The Court, in fact, denied counsel's pre-trial motion to dismiss the assisted suicide charge in the Court's Opinion and Order dated March 9, 1999 and, further, the People dismissed said charge on their own motion.

Moreover, subsequent to the Defendant knowingly, intelligently and voluntarily waiving his right to counsel, the Court repeatedly questioned the Defendant, at numerous and various times during the trial proceedings, whether or not he wished to continue in this regard. Despite said inquiries, the Defendant continued to waive his right to counsel, indicating on each and every occasion his desire to represent himself in this matter. In *Faretta v. California*, the United States Supreme Court stated:

> The right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law. Thus, whatever else may or may not be open to him on appeal, a defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of "effective assistance of counsel."

Faretta v. California, 422 US 806, 834 n46; 95 S Ct 2525; 45 L Ed 2d 562 (1975). Defendant is precluded in this matter from utilizing his waiver of trial counsel as both a sword and a shield in order to achieve the outcome of his desire.

Appendix B

Accordingly, Defendant, Jack Kevorkian's, motion for new trial is hereby DENIED, pursuant to MCR 6.431(B), for lack of merits on the grounds presented.

IT IS SO ORDERED.

s/ Jessica R. Cooper
HONORABLE JESSICA R. COOPER

Dated: July 15, 1999.

APPENDIX C — ORDER OF THE MICHIGAN SUPREME COURT DATED APRIL 9, 2002

MICHIGAN SUPREME COURT
LANSING, MICHIGAN

Entered: April 9, 2002

Maura D. Corrigan,
Chief Justice

Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Clifford W. Taylor
Robert P. Young, Jr.
Stephen J. Markman,
Justices

120561 & (78)
SC: 120561
COA: 221758
Oakland CC: 98-163675-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JACK KEVORKIAN,

Defendant-Appellant.

Appendix C

ORDER

On order of the Court, the motion for immediate consideration is considered, and it is GRANTED. The application for leave to appeal from the November 20, 2001 decision of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

Kelly, J., would grant leave to appeal.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

April 9, 2002 s/ Corbin R. Davis

APPENDIX D — CONSTITUTIONAL PROVISIONS INVOLVED

U.S. CONST., AMEND. 5

Criminal actions — Provisions concerning — Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST., AMEND. 6

Rights of the accused.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Appendix D

U.S. CONST., AMEND. 8

Bail-Punishment.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. CONST., AMEND. 9

Rights retained by people.

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

U.S. CONST., AMEND. 14

Sec. 1 [Citizens of the United States.]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX E — DEFENDANT/APPELLANT, DR. JACK KEVORKIAN'S, APPLICATION FOR LEAVE TO APPEAL THE NOVEMBER 20, 2001 ORDER OF THE COURT OF APPEALS DATED DECEMBER 11, 2001

STATE OF MICHIGAN

IN THE SUPREME COURT

FROM THE COURT OF APPEALS

(On Appeal from the Circuit Court for the County of Oakland)

Supreme Ct. Case No.

Court of Appeals
Docket No. 221758

Lower Ct. Case No. 98-163675-FC
Hon. Jessica R. Cooper

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff/Appellee,

vs.

JACK KEVORKIAN,

Defendant/Appellant.

* * *

Appendix E

DEFENDANT/APPELLANT, DR. JACK KEVORKIAN'S, APPLICATION FOR LEAVE TO APPEAL THE NOVEMBER 20, 2001 ORDER OF THE COURT OF APPEALS

[TABLE OF CONTENTS intentionally omitted]

STATEMENT OF ORDER APPEALED FROM AND RELIEF SOUGHT

A verdict convicting Defendant/Appellant, Dr. Jack Kevorkian ("Dr. Kevorkian"), of murder in the second degree and delivery of a controlled substance was returned by the jury on March 26, 1999. Dr. Kevorkian was sentenced on April 13, 1999, and Judgment and Sentence was entered by the Trial Court on that date.

Dr. Kevorkian timely filed a Motion for a New Trial on May 21, 1999 pursuant to MCR 6.431(A)(1). Dr. Kevorkian's Motion for a New Trial was denied by the Trial Court without oral argument on July 15, 1999. Dr. Kevorkian timely appealed as of right the Trial Court's July 15, 1999 decision to the Court of Appeals.

On November 20, 2001, the Court of Appeals affirmed the Trial Court's July 15, 1999 decision. Pursuant to MCR 7.301(A)(2), Dr. Kevorkian files this application for leave to appeal the November 20, 2001 Order of the Court of Appeals (attached hereto as Exh. 1) affirming the Trial Court's July 15, 1999 decision which denied Dr. Kevorkian's Motion for New Trial.

Appendix E

Dr. Kevorkian respectfully requests that this Court accept the instant application for leave to appeal for the reasons stated herein, reverse the erroneous decisions of the Court of Appeals and the Trial Court and/or remand this case back to the Trial Court for a new trial.

STATEMENT OF QUESTIONS PRESENTED

I. SHOULD THIS COURT GRANT DR. KEVORKIAN'S APPLICATION FOR LEAVE TO APPEAL IN ORDER TO CONFIRM THAT IT IS THE PROPER ROLE OF THE MICHIGAN COURTS TO DETERMINE WHETHER THERE IS A CONSTITUTIONAL RIGHT TO BE FREE FROM UNBEARABLE PAIN AND SUFFERING WHICH CAN NOT BE ALLEVIATED WITH PALLIATIVE CARE UNDER THE MICHIGAN AND/OR UNITED STATES CONSTITUTIONS.

Defendant/Appellant, Dr. Kevorkian, answers, "Yes."

Plaintiff/Appellee, People of the State of Michigan (the "People"), answer, "No."

The Trial Court would answer, "No."

The Court of Appeals would answer, "No."

II. SHOULD THIS COURT GRANT DR. KEVORKIAN'S APPLICATION FOR LEAVE TO APPEAL IN ORDER TO DETERMINE WHETHER THERE ARE ANY CIRCUMSTANCES UNDER WHICH A PROSECUTOR MAY, IN THE PRESENCE OF THE JURY, COMMENT

Appendix E

UPON A DEFENDANT'S DECISION TO AVAIL HIMSELF OF HIS ABSOLUTE CONSTITUTIONAL RIGHT NOT TO TESTIFY AS A WITNESS AGAINST HIMSELF.

Defendant/Appellant, Dr. Kevorkian, answers, "Yes."

Plaintiff/Appellee, the People, answer, "No."

The Trial Court would answer, "No."

The Court of Appeals would answer, "No."

III. SHOULD THIS COURT GRANT DR. KEVORKIAN'S APPLICATION FOR LEAVE TO APPEAL IN ORDER TO CONSIDER THE PROPER STANDARD OF CONDUCT FOR COUNSEL SERVING BOTH AS ADVOCATE AND ADVISOR BEFORE AND DURING TRIAL IN ORDER TO ENSURE THAT A DEFENDANT'S SIXTH AMENDMENT RIGHT TO COUNSEL IS PROPERLY PROTECTED.

Defendant/Appellant, Dr. Kevorkian, answers, "Yes."

Plaintiff/Appellee, People of the State of Michigan (the "People"), answer, "No."

The Trial Court would answer, "No."

The Court of Appeals would answer, "No."

IV. SHOULD THIS COURT GRANT DR. KEVORKIAN'S APPLICATION FOR LEAVE TO APPEAL IN ORDER TO DETERMINE WHETHER, UNDER WELL-SETTLED MICHIGAN LAW, A DEFENDANT HAS A RIGHT TO CALL *RES GESTAE* WITNESSES AS PART OF HIS DEFENSE.

Defendant/Appellant, Dr. Kevorkian, answers, "Yes."

Plaintiff/Appellee, the People, answer, "No."

The Trial Court would answer, "No."

The Court of Appeals would answer, "No."

V. SHOULD THIS COURT GRANT THE INSTANT APPLICATION FOR LEAVE TO APPEAL IN ORDER TO CORRECT THE PLAIN ERRORS WHICH OCCURRED DURING THE TRIAL, EACH OF WHICH PREJUDICED THE SUBSTANTIAL RIGHTS OF DR. KEVORKIAN.

Defendant/Appellant, Dr. Kevorkian, answers, "Yes."

Plaintiff/Appellee, the People, answer, "No."

The Trial Court would answer, "No."

The Court of Appeals would answer, "No."

Appendix E

STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

Dr. Kevorkian retained David Gorosh ("Gorosh") as his lead defense trial counsel in connection with the instant action. R. Def.'s Br. In Supp. of Mot. for a New Trial ("New Trial Br."), Exh. A (Aff. of Lisa Dwyer, Esq., hereinafter referred to as "Exh. A") at 1. Lisa Dwyer, Esq. ("Dwyer"), a member of the State Bar of Michigan since 1993, was asked by Gorosh to serve as co-counsel. *Id.* at 1. Gorosh had only three years experience, and his trial experience was extremely limited. R. New Trial Br., Exh. B (Aff. of Michael Schwartz, Esq., hereinafter referred to as "Exh. B") at 1-2, 4-5. He had never defended a felony, much less a murder case. *Id.* at 1. Gorosh's former employer and supervisor, Michael Schwartz, Esq. ("Schwartz"), states, based on his previous experience working with Gorosh, that when faced with a situation where Gorosh was required to subordinate his own interests to that of his client, Gorosh was either unwilling or unable to do so. *Id.* at 3, 5. Gorosh was ill-equipped to serve as lead counsel in a murder case, given his lack of experience, his inability to grasp important strategic considerations, and his inability to consider the best interests of the client as noted in affidavits submitted by Gorosh's colleagues and co-counsel. R. New Trial Br., Exhs. A at 2; B at 2-5.

On December 9, 1998, Dr. Kevorkian was bound over on the three counts charged in the information: Count I — first degree murder, Count II — delivery of a controlled substance, and Count III — assisting suicide. December 9, 1999 Tr. at 119-124, 142; R. First Am. General Information.

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The charges were brought based upon a videotape that was aired on 60 Minutes, which subsequently was admitted as an exhibit at trial. March 23, 1999 Tr. Vol. II at 8-9. The videotape revealed that: (1) Thomas Youk suffered from ALS, a degenerative disease that caused him unbearable pain and suffering; (2) Thomas Youk had no control of his muscles and was terrified of choking; (3) Thomas Youk was close to death when he sought the aid of Dr. Kevorkian to alleviate his pain and suffering; and (4) in order to relieve Thomas Youk's pain and suffering, Dr. Kevorkian administered an injection to Thomas Youk, even though such injection could possibly hasten the time of death. *Id.* The Prosecution alleged that this act constituted murder, possession of a controlled substance, and criminal assistance to suicide.

During the initial stages of the co-representation, Dwyer felt she would have input regarding defense strategies. R. New Trial Br., Exh. A at 1. However, by the time of Dr. Kevorkian's preliminary hearing on December 16, 1998, Dwyer realized her recommendations would have no effect on Gorosh's decisions. *Id.*

The relationship between Dwyer and Gorosh deteriorated rapidly, and by January 1999, Dwyer discussed the possibility of withdrawing as co-counsel. *Id.* at 3. Gorosh persuaded Dwyer to stay on because he felt Dwyer had developed a good working relationship with Dr. Kevorkian. *Id.* at 1. Nevertheless, Gorosh's control over all aspects of the case became unyielding. *Id.* at 1-2. Gorosh withheld vital information from Dwyer. *Id.* Gorosh made public comments without consulting Dwyer, and comments to the media against the express wishes of Dr. Kevorkian. *Id.*; R. Def.'s Reply

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Brief in Further Supp. of Mot. for a New Trial ("New Trial Reply Br."), Exh. A (Aff. of Kevorkian, hereinafter referred to as "Exh. A") at 1. Besides ignoring the advice and input of co-counsel, Gorosh also ignored the input and wishes of his client, Dr. Kevorkian. *Id.*

Gorosh obstinately insisted on proceeding with a pre-trial motion to quash the assisted suicide count, with the full knowledge that this could prevent his client from calling favorable witnesses at trial. R. New Trial Br., Exh. A at 1-2. Gorosh proceeded with this motion against the advice of co-counsel, Dwyer, as well as several experienced attorneys, and the express wishes of his client, Dr. Kevorkian. R. New Trial Br., Exhs. A at 1-2; B at 3-4; R. New Trial Reply Br., Exh A at 1. Schwartz, an experienced criminal attorney and Gorosh's former employer, strongly advised Gorosh just before the preliminary hearing not to seek dismissal of the assisted suicide charge because Schwartz considered charging both murder and assisting suicide to be a mistake on the part of the Prosecutor. R. New Trial Br., Exh. B at 1-4.

Subsequent to the bindover by the magistrate, Schwartz again strongly urged Gorosh not to seek dismissal of the assisted suicide charge, and explained to Gorosh how maintaining both charges could be advantageous to Dr. Kevorkian. *Id.* at 4. Gorosh nevertheless insisted that it was important to have whatever charges he could dismissed as soon as possible, even if that meant giving up beneficial arguments that could later be made on behalf of Dr. Kevorkian. *Id.* Schwartz's partner, attorney Geoffrey Fieger, Esq. ("Fieger") similarly strongly recommended to Gorosh that he not seek the dismissal of the assisted suicide charge. *Id.*

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In addition to seeking to dismiss the assisted suicide charge, Gorosh discounted a motion to quash the murder charge written by Dwyer. R. New Trial Br., Exh. A at 2. Gorosh deleted a common law challenge to the murder count that Dwyer sought to include in the motion to quash because he failed to grasp the legal argument. *Id.* Dwyer and Gorosh heatedly argued about the presentation of these motions. *Id.* Gorosh insisted that no one knew the case better than him. *Id.* Dwyer indicated that when defending a murder case, all efforts should be made toward attacking the murder count, and that the motion attacking the murder count was meritorious. *Id.* Dwyer also recommended that there was a way to argue both the motion attacking the murder charge and the motion to drop the assisting suicide charge jointly. *Id.* Gorosh rejected Dwyer's input, and neglected to zealously argue the dismissal of the murder count at the motion hearing. *Id.*

Despite the admonitions of Dwyer, Schwartz and Fieger, Gorosh did seek to dismiss the assisted suicide motion. R. New Trial Br., Exhs. A at 2; B at 3-4. At the motion hearing held on March 3, 1999, even Judge Cooper was baffled by Gorosh's decision. March 3, 1999 Motion Hearing Tr. at 12 (Court). The Court asked Gorosh four times if he was certain this was how he wanted to proceed. *Id.* at 12-13. The Court stated on the record, "Let me see if I've got this straight. You want this court to dismiss the four-year felony and let him go to trial on murder in the first degree?" *Id.* at 12 (Court). The Court then questioned Gorosh about the efficacy of this strategy, asking "What if they decide not to participate on assisted suicide at all and they just go for murder." *Id.* at 13. Gorosh replies, "What do you mean?" *Id.* (Gorosh). The Court continues, "What if they decide . . . that they're going to

nolle pros the assisted suicide?" *Id.* (Court). The Court further questions Gorosh, "And you want them to go forward on murder in the first degree without having assisted suicide as one of those charges?" *Id.* Despite the clear suggestions by the Court, Gorosh pressed ahead with his argument to quash the assisted suicide count. *Id.* at 13-14 (Gorosh). On March 12, 1999, the Prosecution did *nolle prosequi* the assisted suicide charge, and proceeded only on the murder and delivery of a controlled substance charges. March 12, 1999 Tr. Dismissal of Count III at 3 (Skrzynski).

As the trial approached, Dr. Kevorkian wished to proceed with a hybrid defense. R. New Trial Br., Exh. A at 2. Dr. Kevorkian wanted to have Gorosh and Dwyer serve as advocates regarding certain matters, and as advisors regarding others. *Id.* Despite this understanding, Gorosh never discussed with Dr. Kevorkian the precise duties each party would have at trial. *Id.* At a March 19, 1999 hearing in chambers, Judge Cooper indicated that she would not permit a hybrid defense. *Id.*; March 19, 1999 Tr. at 12-14 (Court). Dr. Kevorkian could either represent himself at trial, or be represented by counsel, but not both. *Id.* At this point, Dr. Kevorkian agreed to allow Gorosh and Dwyer to conduct the trial. R. New Trial Br., Exhs. A at 2; C (Aff. of Ruth Holmes, hereinafter referred to as "Exh. C") at 2-3.

Gorosh then decided he would essentially conduct all aspects of the trial, including jury voir dire, opening and closing statements, and the examination of all witnesses, except Dr. Dragovic. R. New Trial Br., Exh. A at 2.

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On the weekend immediately preceding the trial, Gorosh did little to prepare. *Id.* at 2-3. On Saturday, March 20th, Gorosh did not make any substantive preparations for trial. *Id.* Gorosh spent most of the day arguing with a young attorney who barely had a working relationship with Dr. Kevorkian. *Id.* Dr. Kevorkian explicitly indicated that he did not want the young attorney involved with the trial. *Id.*; R. New Trial Reply Br., Exh. A at 1. On Sunday, March 21st, Gorosh and Dwyer were to meet with Dr. Kevorkian. R. New Trial Br., Exh. A at 3. Dwyer met with Dr. Kevorkian at 10:00 a.m., and discussed the division of trial duties. *Id.* At about 10:30 a.m., Gorosh and the other young attorney arrived. *Id.* at 3. Dr. Kevorkian immediately became distressed that this other young attorney was present, because he had explicitly instructed Gorosh not to bring him. *Id.*; R. Exh. C at 2; R. New Trial Reply Br., Exh. A at 1. An hour-long argument ensued wherein Dr. Kevorkian informed Gorosh that he no longer trusted him. R. New Trial Br., Exhs. A at 3; C at 2-3; R. New Trial Reply Br., Exh. A at 1.

Dr. Kevorkian told Gorosh in no uncertain terms that he would represent himself unless Dwyer could represent him at trial. R. New Trial Br., Exhs. A at 3; C at 2-3. Gorosh was adamant that Dwyer could not represent Dr. Kevorkian. R. New Trial Br., Exh., A at 3. Dwyer discussed this matter with Gorosh, and Gorosh reiterated that she could not conduct the trial because he was lead counsel, and it would damage his reputation if Dwyer replaced him. *Id.* For the same reason, Gorosh refused Dwyer's suggestion that she conduct the substantive aspects of the trial in the beginning, with the hope that the relationship between Gorosh and Dr. Kevorkian would improve once trial commenced. *Id.*

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Because Gorosh stated that he would not permit Dwyer to act as trial counsel, Dwyer expressed reservations when Dr. Kevorkian again asked her to represent him at trial. *Id.* Dwyer indicated she was concerned about conducting the trial alone because terminating Gorosh would cause a great deal of publicity. *Id.* In addition, Dwyer indicated she felt awkward because Gorosh had asked her to assist as co-counsel. *Id.* Despite knowing that representing himself could be detrimental to his case, Dr. Kevorkian decided he would rather represent himself than be represented by Gorosh. *Id.* Had Gorosh permitted Dwyer to act as lead counsel, as Dr. Kevorkian desired, Dr. Kevorkian would not have personally presented the case to the jury. *Id.*

Dwyer discussed the breakdown of the attorney-client relationship with Gorosh on the way to Court on March 22, 1999, the day of trial. *Id.* Dwyer suggested that Gorosh discuss the situation with Judge Cooper, but Gorosh refused. *Id.* Prior to the start of trial, Judge Cooper called counsel into chambers to discuss preliminary matters. *Id.* at 2-3. Gorosh indicated to Judge Cooper that Dr. Kevorkian would be representing himself, with Dwyer and Gorosh acting as advisors. *Id.* As a result of this change, Judge Cooper questioned Gorosh. *Id.* Gorosh never informed Judge Cooper of Dr. Kevorkian's desire to have Dwyer act as lead trial counsel. *Id.* Gorosh deliberately undermined Dr. Kevorkian by suggesting Dr. Kevorkian was incompetent, and that Dr. Kevorkian might disrupt the proceedings. *Id.* Dwyer did not believe that Gorosh was acting in Dr. Kevorkian's best interest, and left the conference after stating that there had been a breakdown in the attorney-client relationship. *Id.*

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Gorosh had represented Dr. Kevorkian as an advocate until the time of trial. December 16, 1998 Tr. Arraignment at 3-5; December 22, 1998 Tr. In Chambers Proceedings at 3; February 1, 1999 Tr. Motion at 3; February 16, 1999 Tr. In Chambers Proceedings at 3; March 3, 1999 Tr. Motion at 3; March 12, 1999 Tr. Dismissal of Count III at 3; March 16, 1999 Tr. Motion at 3-4; March 19, 1999 Tr. Hearing at 3. Although the Trial Court purportedly denied any form of hybrid representation, the Trial Court insisted that Gorosh stay on to provide advice and consultation to Dr. Kevorkian, and Dr. Kevorkian agreed to this arrangement. March 22, 1999 Tr. Vol. I at 10-12; March 23, 1999 Tr. Vol. II at 95-96, 101, 135, 137, 145 (Court); March 23, 1999 Tr. In Chambers Proceedings at 13, 25-26 (Court). In fact, Gorosh even acted as an advocate at times as well as an advisor for Dr. Kevorkian during trial. R. New Trial Br., Exh. A at 2; March 23, 1999 Tr. Vol II at 95-96, 98 (Court). During the trial, Gorosh continued to argue motions to the Trial Court, prepare trial memoranda, speak on behalf of Dr. Kevorkian during in-chambers proceedings, and advise Dr. Kevorkian pursuant to the Trial Court's directions. March 22, 1999 Tr. Vol. I at 237, 247, 268; March 23, 1999 Tr. In Chambers Proceedings at 3; March 25, 1999 Tr. Vol. III at 3; March 23, 1999 Tr. Vol. II at 95, 98, 101, 132, 145; March 26, 1999 AM Tr. In Chambers Proceedings.

Throughout the trial, Gorosh and Dwyer sat at the counsel table with Dr. Kevorkian. R. New Trial Br., Exh. A at 4; March 22, 1999 Tr. Vol. I at 10-11, 247. Dr. Kevorkian was under the impression that he was represented by counsel throughout the trial. March 22, 1999 Tr. Vol. I at 268. Dr. Kevorkian understood his role to be that of a mouthpiece

to present information prepared by his attorneys. March 23, 1999 Tr. Vol. II at 137; March 23, 1999 Tr. In Chambers Proceedings at 12-13, 25-26.

However, after it became clear to Gorosh that he would not be conducting the trial, he became distant and at times withheld legal advice from Dr. Kevorkian, in an attempt to frustrate Dr. Kevorkian so that he would turn over all aspects of the case to Gorosh. R. New Trial Br., Exh. C at 3-4. As the trial progressed, Gorosh became far more interested in making comments to the media than in defending his client. R. New Trial Br., Exhs. A at 1-4; C at 4; R. New Trial Reply Br., Exh. A at 1. Gorosh's priorities became confused, detrimentally affecting Dr. Kevorkian's defense and best interests. R. New Trial Br., Exh. C at 4; R. New Trial Reply Br., Exh. A at 1.

During the trial, Gorosh displayed contempt and ridicule for Dr. Kevorkian, and the defense Dr. Kevorkian was attempting to present. R. New Trial Br., Exhs. A at 4; C at 3-4. Throughout the trial, Gorosh made comments under his breath, rolled his eyes, sighed deeply, put his head in his hands, smirked, and appeared to share the Trial Court's discomfort during difficult points, rather than assisting his client, Dr. Kevorkian. R. New Trial Br., Exh. A at 4. Gorosh sat between Dwyer and Dr. Kevorkian, making it impossible for Dwyer to consult with Dr. Kevorkian during trial even though Dr. Kevorkian so desired. *Id.*; R. New Trial Reply Br., Exh. A at 1. Ruth Holmes, DCE ("Holmes"), a jury consultant and handwriting and document examiner versed in evaluating body language, was retained by Dr. Kevorkian as a jury consultant to aid in his defense. R. New Trial Br.,

Exh. C at 1. Holmes advised Gorosh that his behavior would have a negative effect on the presentation of Dr. Kevorkian's defense. *Id.* at 4.

During the times that Gorosh acted as an advocate as well as the times he acted as an advisor, Gorosh provided very little substantive advice or consultation to Dr. Kevorkian with respect to trial preparation, and virtually no advice during the actual trial proceedings themselves. *Id.*; R. New Trial Reply Br., Exh. A at 1. Gorosh did not respond to Dr. Kevorkian's requests for information, despite Dr. Kevorkian's repeated inquiries. R. New Trial Reply Br., Exh. A at 1. Gorosh never showed Dr. Kevorkian a complete witness list. *Id.* Gorosh never coached Dr. Kevorkian about the questioning of witnesses nor the proper procedures for making objections. *Id.* Gorosh rarely returned Dr. Kevorkian's telephone calls regarding the case, and never did so in a timely manner. *Id.* As the trial progressed, Dr. Kevorkian developed further distrust of Gorosh, and began to feel that Gorosh was incapable of providing adequate counsel. *Id.* Dr. Kevorkian became shocked at Gorosh's unscrupulous and insolent behavior. *Id.*

Dr. Kevorkian requested Gorosh's assistance in preparing legal arguments and an offer of proof in support of calling Melody and Terry Youk, the wife and brother of Thomas Youk, as witnesses for the defense. R. New Trial Br., Exh. A at 4. Gorosh did not prepare any research, nor the offer of proof as Dr. Kevorkian had specifically requested. *Id.*; R. New Trial Br., Exh. C at 3-4. As a result of Gorosh's inaction, Dwyer was left to hastily prepare an offer of proof and legal argument for Dr. Kevorkian during a lunch recess. *Id.* Even when the Trial Court provided the opportunity and time

for the defense to present a written memorandum in support of its position, Dwyer was left to hurriedly put something together to attempt to protect Dr. Kevorkian and preserve the record because Gorosh did nothing. *Id.*; March 23, 1999 Tr. Vol. II at 145 (Court). Judge Cooper commented on the quality of the memorandum submitted, stating, "I can only assume the attorneys who aided and assisted, or if they aided and assisted, are constrained under the theory of the case." March 25, 1999 Tr. Vol. III at 3 (Court).

Although numerous avenues were available to support the admission of the testimony of the Youks, Gorosh pursued none of these, and did not properly advise Dr. Kevorkian about how to present legal support for the admission of such testimony. R. New Trial Br., Exhs. A at 4; C at 4. Furthermore, despite the progressive and ultimately fatal nature of Thomas Youk's disease, Gorosh did not challenge the cause of death, a rudimentary legal tactic in a murder trial, particularly one that is appropriate where the decedent suffered from a fatal and incurable medical condition. March 23, 1999 Tr. Vol. II at 75-78, 90-91 (Dragovic). There was evidence to support raising a question as to the cause of death of Thomas Youk due to the advanced stage of his ALS, and this was one of the grounds by which Melody and Terry Youk could have been called as witnesses. *Id.* Indeed, Thomas Youk gasped *prior* to any actions by Dr. Kevorkian, and this sound may very well have been associated with death due to ALS. March 25, 1999 Tr. Vol. III at 63 (Skrzynski). Because no adequate legal arguments were presented, the Trial Court denied the admission of the testimony of Melody and Terry Youk, and Dr. Kevorkian was left without any defense. R. New Trial Br., Exh. A at 4, Exh. C at 4; March 25, 1999 Tr. Vol. III at 5-6 (Court).

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Dwyer requested that Gorosh instruct Dr. Kevorkian to object to numerous inappropriate references made by the Prosecutor during his closing and rebuttal arguments. R. New Trial Br., Exh. A at 4-5. Nevertheless, Gorosh only advised Dr. Kevorkian to object on one occasion. *Id.*; March 25, 1999 Tr. Vol. III at 65 (Dr. Kevorkian).

In his closing, the Prosecutor discussed Dr. Kevorkian's motives for preparing the videotape, although Dr. Kevorkian was not permitted to introduce the testimony of Melody and Terry Youk which would likewise bear on his motives for preparing the videotape. March 25, 1999 Tr. Vol. III at 25, 29-31, 34-35, 41-42 (Skrzynski), 5-6 (Court). The Prosecutor asserted that Dr. Kevorkian "pick[ed]" Thomas Youk, when in fact Melody and Terry Youk could have testified that it was Thomas Youk who picked Dr. Kevorkian. *Id.* at 25 (Skrzynski), 5-6 (Court). The Prosecutor went on to claim that Dr. Kevorkian learned only minimal information about Thomas Youk. *Id.* at 26 (Skrzynski). Dr. Kevorkian was prohibited from introducing the testimony of Melody and Terry Youk in order to show what else he knew about Thomas Youk's medical condition and Thomas Youk personally. March 23, 1999 Tr. Vol. II at 112-115 (Dr. Kevorkian), 121-122 (Melody Youk); March 25, 1999 Tr. Vol. III at 5-6 (Court). The Prosecutor discussed Dr. Kevorkian's intent, although Dr. Kevorkian was not permitted to introduce any evidence of his intent. March 25, 1999 Tr. Vol. III at 28, 31 (Skrzynski), 5-6 (Court); March 23, 1999 Tr. Vol. II at 100 (Dr. Kevorkian), 121-125 (Melody Youk). The Prosecutor stated, "You can infer a person's intent from . . . the circumstances surrounding what they do." March 25, 1999 Tr. Vol. III at 28 (Skrzynski). Dr. Kevorkian was precluded

from presenting the testimony of Terry and Melody Youk as to the facts and circumstances surrounding his interaction with Thomas Youk. March 23, 1999 Tr. Vol. II at 121-125 (Melody Youk); March 25, 1999 Tr. Vol. III at 5-6 (Court). The Prosecutor stated that Dr. Kevorkian had a large piece of medical equipment with him. March 25, 1999 Tr. Vol. III at 31-32 (Skrzynski). Melody and Terry Youk were precluded from testifying as to what Dr. Kevorkian brought with him that night. *Id.* at 5-6 (Court). The Prosecutor also denied that Thomas Youk was afraid of choking to death. *Id.* at 37-38. Melody and Terry Youk could have testified to Thomas Youk's medical condition and the fear this caused him, but they were not permitted to do so. *Id.* at 5-6 (Court). The Prosecutor presented several inflammatory, prejudicial and extreme examples of euthanasia for which no evidence was presented. *Id.* at 65-66 (Skrzynski). Gorosh did not object to any of these comments, and prompted Dr. Kevorkian to object only once. *Id.* at 25-46, 61-66 (Skrzynski), 65 (Dr. Kevorkian).

The Prosecution made several references directly bearing upon Dr. Kevorkian's decision to invoke his absolute Constitutional right not to testify on his own behalf during objections to Dr. Kevorkian's closing argument. March 25, 1999 Tr. Vol. III at 32-33, 50-54 (Skrzynski). Initially, the Prosecutor impliedly commented on Dr. Kevorkian's decision not to testify, saying, "He [Dr. Kevorkian] turns the videotape off and he goes back to work, apparently. We don't know exactly what he does. And why does he turn it off? Why doesn't he keep the whole thing on all the time?" *Id.* at 32-33 (Skrzynski). A short time later, the Prosecutor stated, "He can't testify now. He can't tell the facts now." *Id.* at 50.

The Prosecutor then interjected, "He cannot put facts before the jury which have not been proven before through testimony or other evidence. He cannot testify now." *Id.* at 53. Immediately thereafter, the Prosecutor said, "he could have gotten on — you know, he didn't." *Id.* at 54. Finally, the Prosecutor stated, "He's now testifying. He's putting new facts before the jury. He can't do that." *Id.* at 54.

After closing arguments, Dwyer told Dr. Kevorkian and Gorosh that it was necessary to make a record about the Prosecution's references to Dr. Kevorkian's decision not to testify. R. New Trial Br., Exh. A at 5. Gorosh did not want to do this because he thought it would then appear that he was incompetent. *Id.* Attorney Mayer Morganroth, who had been persuaded at this time by Dr. Kevorkian to appear for the first time on behalf of Dr. Kevorkian, convinced Gorosh to make the necessary objection, and preserve the record. *Id.*; March 26, 1999 AM Tr. In Chambers Proceedings at 4-12; March 26, 1999 Tr. In Chambers Proceedings.

When the jury trial was concluded, Dr. Kevorkian was convicted of second degree murder and delivery of a controlled substance. March 26, 1999 Tr. Vol. IV at 6 (Jury Foreman). The Michigan Department of Corrections recommended a downward departure from the Michigan Sentencing Guidelines in its April 8, 1999 Sentence Recommendation to the Trial Court. R. Michigan Department of Corrections Sentence Recommendation. The Sentencing Report indicates that the facts and circumstances of this case are unusual inasmuch as Thomas Youk was gravely ill and sought Dr. Kevorkian's assistance, among other mitigating circumstances. *Id.* at 2. The Sentencing Report further states

that these facts may mitigate Dr. Kevorkian's culpability, and are not adequately taken into account by the sentencing guidelines. *Id.*

Despite the downward departure from the Michigan Sentencing Guidelines recommended by the Department of Corrections, the Trial Court did not deviate from the standard sentencing guidelines and sentenced Dr. Kevorkian to ten to twenty-five years in prison on the second degree murder conviction, and three to seven years in prison for the delivery of a controlled substance. April 13, 1999 Tr. at 38 (Court).

Dr. Kevorkian filed a timely Motion for a New Trial on May 21, 1999. R. Def.'s Mot. For a New Trial. The Motion for a New Trial was based on affidavits from and conversations with members of the defense team who explained the facts and circumstances of Gorosh's representation of Dr. Kevorkian. R. New Trial Br.; R. New Trial Reply Br. Dr. Kevorkian's Motion sought a new trial on the grounds of ineffective assistance of counsel, or, at a minimum, requested a *Ginther* hearing to properly present and preserve evidence supporting Dr. Kevorkian's claim of ineffective assistance of counsel. *Id.* The Trial Court summarily denied Dr. Kevorkian's Motion, as well as his request for a *Ginther* hearing, without allowing argument, in an Opinion and Order dated July 15, 1999. R. July 15, 1999 Opinion and Order.

Dr. Kevorkian timely filed his Claim of Appeal in the Court of Appeals on August 23, 1999 regarding the Trial Court's denial of his Motion for New Trial. R. Claim of Appeal. Dr. Kevorkian filed his Appellate Brief on November 11, 1999. R. Dr. Kevorkian's, Appellate Br.

Appendix E

On September 11, 2001, the Court of Appeals heard oral argument with respect to the instant appeal. On November 20, 2001, the Court of Appeals affirmed the Trial Court's Order denying Dr. Kevorkian's Motion for New Trial, and Dr. Kevorkian seeks application for leave to appeal therefrom. R. November 20, 2001 Order (attached hereto as Addendum, Exh. 1).

ARGUMENT

I. STANDARD OF REVIEW.

This Court may, in its discretion, grant an application for leave to appeal where the application involves "legal principles of major significance to the state's jurisprudence" or, in an appeal from a decision of the Court of Appeals, "the decision [of the Court of Appeals] is clearly erroneous and will cause material injustice or the decision [of the Court of Appeals] conflicts with a Supreme Court decision or another decision of the Court of Appeals." MCR 7.302(B).

As shown below, the instant Application raises questions of great legal significance with respect to Michigan jurisprudence inasmuch as it involves weighty Constitutional issues affecting an accused's right to the effective assistance of counsel and right to remain silent under the Michigan and U.S. Constitutions.

Furthermore, the instant Application raises questions of great legal significance with respect to the proper role of the courts in enforcing Constitutional rights under United States and Michigan Constitutions.

In addition, this case raises questions of great legal significance regarding a defendant's right to call *res gestae* witnesses in his/her defense in order to present the full circumstances surrounding the alleged crime to the trier of fact.

Finally, the November 20, 2001 decision rendered by the Court of Appeals conflicts with other decisions of the Court of Appeals, and well-settled legal principles, regarding the waiver of the Constitutional right to counsel and the proper standard of conduct for counsel acting as advocate and advisor.

II. THE INSTANT APPLICATION SHOULD BE GRANTED BECAUSE THE CHARGES AGAINST DR. KEVORKIAN MUST BE DISMISSED BASED ON THE NINTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 17 AND 23 OF THE MICHIGAN CONSTITUTION.

A. *The Court of Appeals Erroneously Held that the Legislature Should Interpret and Enforce the Constitution Instead of the Courts.*

The Court of Appeals erroneously ruled that it is *not* up to Courts, but up to the legislature, to determine whether there is a Constitutionally protected right to be free from unbearable pain and suffering. This is clearly erroneous and in violation of the United States and Michigan Constitutions inasmuch as it is up to the Courts to interpret and enforce

the Constitution[1]. Indeed, this Court has held that "[i]t is the duty of the courts to interpret the Constitution." *West Shore Community College v. Manistee County Bd. of Comm'rs*, 389 Mich. 287, 302; 205 NW2d 441 (1973). Likewise, the United States Supreme Court, reaffirming its historic holding in *Marbury v. Madison*, 5 U.S. 137 (1803), recently held "it is *emphatically* the province and duty of the judicial department to say what the law is." *United States v. Morrison*, 529 U.S. 598, 617 (2000) (citation omitted, emphasis added).

The Court of Appeals' assertion that this issue should be left for the legislature is not only erroneous, but also merely begs the question. If there is a Constitutionally protected right to be free from unbearable pain and suffering, *there is no question for the legislature because the government can not abridge a Constitutionally protected right*[2]. It is the duty and obligation of the courts to ensure that Constitutionally protected rights are not inappropriately infringed upon by the government. *Id.*

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1. In addition, the Court of Appeals spends the bulk of its opinion discussing euthanasia. Dr. Kevorkian's Appellate Brief did not once mention euthanasia for the simple reason that Dr. Kevorkian does not contend that there is a right to euthanasia. Instead, as fully set forth herein, Dr. Kevorkian asserts that there is a right to be free from unbearable pain and suffering which can not be relieved through palliative treatment. Because it would be cruel, illogical and untenable to insist that, under the United States and Michigan Constitutions, a person *can* be forced to endure unbearable and unending pain, the Court of Appeals simply ignored this fundamental question.

2. Of course, the legislature could regulate the assertion of the right within Constitutionally boundaries (*i.e.*, certain legislative restrictions on free speech are permissible, while others are not).

Instead of addressing this issue, the Court of Appeals inexplicably held that "courts are simply unsuited" to "assess the quality of human life and determine, as a matter of law, that putting an end to suffering is justifiable in one case while, in another, it is not." However, this question was simply not before the Court of Appeals. The simple question before the Court of Appeals was, is there a Constitutional right to be free from unbearable pain and suffering? The courts should not answer "No" simply in order to avoid difficult questions which could follow. Indeed, courts are often called upon to draw lines and determine what specific actions are or not covered by Constitutionally protected rights. If there is a right to be free from unbearable pain and suffering, determining when and how this right can be invoked is no different than determining what kinds of speech are protected by the First Amendment.

In fact, Dr. Kevorkian was prepared to present evidence, through the testimony of Melody and Terry Youk, supporting his claim that Thomas Youk was being forced to endure unbearable pain and suffering. However, Dr. Kevorkian was prevented from presenting this evidence, in violation of Michigan law, due to the ineffective assistance of his counsel and the refusal of the Trial Court to permit the testimony of *res gestae* witnesses.

B. *The Right to Be Free From Unbearable Pain and Suffering is Deeply Rooted in American Jurisprudence and is Constitutionally Protected.*

The right to be free from unbearable and irremediable pain and suffering is deeply rooted in this nation's history and in the Constitution itself.

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First, both the Michigan and United States Constitutions guarantee that a person shall not be deprived of liberty. U.S. Const., Am. XIV; Const. 1963 Art. I, § 17.

Second, the Fourteenth Amendment to the United States Constitution states, in pertinent part, "No state . . . shall deprive any person of life, liberty, or property, without due process of law." U.S. Const., Am. XIV. Similarly, Article 1, Section 17 of the Michigan Constitution states, in pertinent part, "No person . . . shall be deprived of life, liberty or property, without due process of law." Const. 1963, Art. 1, § 17.

Third, the Ninth Amendment and the almost identical words of Article 1, Section 23 of the Michigan Constitution explicitly state that certain *unenumerated rights are reserved to the People*, and are not to be abridged by the government. U.S. Const., Am. IX; Const. 1963, Art. 1, § 23.

Fourth, traditional Constitutional interpretation requires that every word has its due force and meaning. *Ogden v. Saunders*, 25 U.S. (12 Wheat) 213 (1827).

Thus, logically, there necessarily must be *some* unenumerated rights protected by the Ninth Amendment to the United States Constitution and Article 1, Section 23 of the Michigan Constitution in order that these sections are not mere surplusage. Whatever these unenumerated rights are, they are expressly reserved to the People and can not be abridged by the government. U.S. Const., Am. IX; Const. 1963, Art. 1, § 23. Therefore, if the Ninth Amendment is to have any substantive meaning, as it must under well-recognized

rules of Constitutional construction, Dr. Kevorkian asserts that a right to be free from inexorable pain and suffering must be among the unenumerated rights protected by the Ninth Amendment and Article 1, Section 23 of the Michigan Constitution. In order for such enumerated rights to have any practical effect, they must be recognized by the Courts, as Dr. Kevorkian requests herein.

Specifically, the right to be free from unbearable pain is deeply rooted in the text of the Constitution. The Eighth Amendment to the United States Constitution strictly prohibits cruel and unusual punishment. U.S. Const., Am. VIII[3]. The policy against cruel and unusual punishment embodied in the Eighth Amendment is firmly established in the Anglo-American tradition of criminal justice. *Trop v. Dulles*, 356 U.S. 86, 99-100 (1958).

Furthermore, the Eighth Amendment's prohibition against cruel and unusual punishment applies not only to the punishment of those convicted of a crime, but also to *any governmental action that amounts to inhumane treatment. Id.* at 100-101. Thus, *the underlying values of the Eighth Amendment clearly represent a fundamental policy against forcing any citizen to endure unbearable pain for any reason. Id.*

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3. Similarly, Article I, Section 16 of the Michigan Constitution prohibits the imposition of "cruel *or* unusual punishments." Const. 1963, Art I, § 16 (emphasis added). Michigan thus offers protection *at least as great* as the Eighth Amendment to the United States Constitution, and may in fact offer greater protection pursuant to the prohibition on cruel *or* unusual punishments. *See, People v. Bullock*, 440 Mich. 15, 28-29; 485 N.W.2d 866 (1992).

Tellingly, the Eighth Amendment does *not* prohibit the punishment of death, but *does* prohibit the imposition of death in any manner which causes unbearable suffering, such as burning at the stake, crucifixion or breaking on the wheel. *In re Kemmler*, 136 U.S. 436, 446 (1890). The *Kemmler* Court noted that the punishment of death is not in itself "cruel" within the meaning of the Eighth Amendment inasmuch as the prohibition against cruel and unusual punishment set forth in the Eighth Amendment "implies something more inhuman and barbarous, something more than the mere extinguishment of life." *Id.* Thus, the United States Supreme Court has recognized that there are worse fates than death, and, pursuant to the Eighth Amendment, the government can not in any way force citizens to suffer some of those fates (*e.g.*, unbearable and irremediable pain and suffering) *under any circumstances*. *Id.*

The United States Supreme Court has explained that

> the basic concept underlying the Eighth Amendment is nothing less than the *dignity of man*. While the State has the power to punish, the [Eighth] Amendment stands to assure that this power be exercised within the limits of civilized standards . . . [T]he words of the Amendment are not precise and [their] scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society. *Trop*, 356 U.S. at 100-101 (emphasis added).

Therefore, while the Eighth Amendment's prohibition against cruel and unusual punishment applies only against the government's imposition of such punishment, the *fundamental values* embodied in the Eighth Amendment make it clear that the Constitution itself abhors the concept of citizens being subjected to unbearable pain and suffering *for any reason*[4]. Furthermore, the Eighth Amendment recognizes that unending, torturous pain and suffering is *worse than death* inasmuch as torture is prohibited, but the humane imposition of death is not.

C. *The United States Supreme Court Has Indicated a Willingness to Consider the Possibility that Any Law Which Effectively Forces a Person to Suffer Unbearably Is Unconstitutional.*

The United States Supreme Court has broadly construed the right to liberty guaranteed by the Fourteenth Amendment to include various rights, including the right to obtain (or decline) certain medical procedures. For instance, in a landmark decision, the United States Supreme Court recognized that the right to privacy is part of the "liberty" protected by the Fourteenth Amendment. *Roe v. Wade*, 410 U.S. 113 (1973). In *Roe*, the right to privacy inherent in the "liberty" protected

4. Specifically, "deliberate indifference to the serious medical needs of prisoners" has been held to be in violation of the Eighth Amendment. *Estelle v. Gamble*, 429 U.S. 97, 104-105 (1976). *See also*, *Marinez v. Mancusi*, 443 F.3d 921, 923 (2d Cir. 1970) (prisoner deprived of pain killers and forced by prison officials to stand against doctor's orders following a serious leg operation did raise colorable claim of violation of Eighth Amendment).

by the Fourteenth Amendment was held to guarantee a woman's right to obtain the medical procedure of abortion prior to viability[5].

Likewise, the Constitutional right at issue here is the intensely personal and private right of a patient to be free from intolerable and irremediable suffering due to a medical condition. The United States Supreme Court and almost every state have implicitly acknowledged this right, supporting the view that the administration of aggressive pain-killing drugs is acceptable, even if this may hasten death, because *no person can be made to suffer unbearably. See, e.g., Vacco v. Quill*, 521 U.S. 793 (1997).

The necessary and direct corollary of this position is that a person should not be forced to suffer unbearably, and such pain must be alleviated *even if such alleviation would hasten death. Id.* In some cases, such as *Vacco*, this right was assured simply by a doctor providing sufficient pain medication, even though the administration of such substantial amounts of pain medication could hasten death. *Id.* However, in other situations, such as the case at bar, the only medical method for ending the interminable suffering of patients such as Thomas Youk is to provide them with an injection to permanently end their suffering, though such injection will dramatically hasten death.

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5. It is worth noting that many of the same "slippery slope" fears posited by the Court of Appeals were (and still are) raised in opposition to the *Roe* decision. Nonetheless, the United States Supreme Court has recognized that certain intensely personal decisions, though possibly subject to abuse, are nonetheless Constitutionally protected because such rights are simply not subject to government intrusion.

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In *Washington v. Glucksburg*, 521 U.S. 702 (1997), the United States Supreme Court held that there is no Constitutional right to physician-assisted suicide, but premised its holding on the fact that a *patient is not restricted from receiving adequate pain medication to alleviate his suffering, even if the receipt of such medication hastens the patient's death.*

The Court of Appeals dramatically misreads *Glucksberg*, and the separate opinions of the Justices in connection therewith. Specifically, Justice O'Connor made clear that it was not necessary for the Court in *Glucksberg* to reach the question of "whether a mentally competent person who is experiencing great suffering has a constitutionally cognizable interest in controlling the circumstances of his or her imminent death." *Id.* at 737 (O'Connor, J., concurring). Thus, the Court in *Glucksberg* and *Vacco* did not reach the question presented here, because, as the Court of Appeals recognized, it was clear that the dying patients in those cases, unlike Thomas Youk, had access to adequate medication sufficient to relieve their pain such that they did not suffer unbearably. *Id.* at 737-738 (the "dying patients [involved in *Glucksberg*] *can* obtain palliative care, even when doing so would hasten their deaths." (emphasis added)).

Nonetheless, Justice Breyer, in *Glucksberg*, acknowledged that the right to be free from unbearable pain would be *central* to any constitutional claim of a right to hasten inevitable death, and that if such a situation were presented, the United States Supreme Court might have to revisit its conclusions because, where unbearable pain can not be relieved, a different issue is presented. *Glucksberg*, 512 U.S. at 792

(Breyer, J., concurring). Justice Breyer acknowledged that medical care allows for the alleviation of pain in all but a few individuals (such as Thomas Youk). *Id.* at 791-792. Justice Breyer recognized that the laws at issue in *Glucksberg* did not "force a dying person to undergo" unbearable pain, therefore the *Glucksberg* case did not implicate the issue of "unavoidable physical pain." *Id.* However, for individuals suffering unbearable physical pain, Justice Breyer recognized that the only solution is sedation, which can result in a coma. *Id.* Such a result would lead to the situation present in *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990), where the Supreme Court recognized the right of a comatose person on life support to remove such medical equipment, even though it would hasten death[6]. It would be infinitely more sensible to recognize the right of those suffering unbearable pain *that can not be alleviated by medical means short of sedation leading to coma* to take any and all affirmative steps necessary to alleviate this pain, without enduring the further mental and physical suffering of a coma, even though such steps may be lead to or hasten death.

Similarly, Justice Stevens, in *Glucksberg*, indicated that where palliative care was inadequate to eliminate pain and suffering, the state's interest in preventing potential abuse and mistake would be only minimally implicated, and he would not "foreclose the possibility that an individual plaintiff seeking to hasten her own death, *or a doctor whose assistance was sought*, could prevail in a more particularized

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6. Indeed, the distinction between removing life support, which, by definition, will lead to death, and administering pain medication that will relieve pain and lead to death, may be one without a difference.

challenge." *Glucksberg*, 521 U.S. at 750 (Stevens, J., concurring) (emphasis added). Justice Stevens noted that state concerns against abuse will not always outweigh the individual liberty interests of a particular patient. *Id.* at 749-750. Justice Stevens further stated that, "*avoiding intolerable pain and the indignity of living one's final days incapacitated and in agony is certainly at the heart of the liberty . . .* to define one's own concept of existence." *Id.* at 745 (citation omitted, emphasis added). Justice Stevens unequivocally stated that "some intrusions [by the government] on the right to decide how death will be encountered are also intolerable." *Id.* Justice Stevens finally stated that "a doctor who prescribes lethal medication does not necessarily intend the patient's death–rather that doctor may seek simply to ease the patient's suffering *and to comply with her wishes*." *Id.* at 751 (emphasis added). Justice Stevens thus recognized that, in the case of a mental competent person, it is a doctor's overriding duty to comply with that person's wishes, and an intent to ease suffering is simply not the same as an intent to cause death, even though death might result.

Furthermore, Justice Souter, in *Glucksberg*, suggested that the Fourteenth Amendment's guarantee of liberty might be the "only possible means of preserving a dying patient's dignity and alleviating her intolerable suffering." *Glucksberg*, 521 U.S. at 752 (Souter, J., concurring)[7].

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7. The Court of Appeals misconstrued Justice Souter's opinion as well, focusing on the issue of assisted suicide, which is not at issue here. Justice Souter clearly acknowledged that a patient had a right to "bodily integrity" and that a patient had a right to exercise their autonomy by choosing death over being "drugged into a stupor" or forced to suffer unbearable pain.

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Thus, Justices of the Supreme Court have suggested allowing for interpretation of the Fourteenth Amendment's guarantee of liberty to apply to various privacy rights, including those related to personal and private medical procedures. *See, e.g., Roe, supra*. The holdings in *Glucksberg* and *Vacco* that the right of the terminally ill to hasten inevitable death was not a fundamental right for Constitutional purposes was predicated on the fact that the terminally ill person was being provided adequate pain medication and was *not* undergoing unbearable suffering. Under *Glucksberg*, a terminally ill person does have a Constitutional right to receive adequate pain medication, even if this has the effect of hastening their inevitable death.

For Thomas Youk, a person in the end stages of a fatal and unforgiving disease, pain medication could no longer relieve his suffering. This is clear from the videotapes introduced into evidence, and would have been further expounded upon by the testimony of Melody and Terry Youk, which was erroneously not permitted to be introduced at trial. The only medical relief for Thomas Youk's condition was the relief he sought from Dr. Kevorkian. The injection Dr. Kevorkian gave to Thomas Youk was the only effective medical way to alleviate Thomas Youk's unbearable suffering, and, as Justice Stevens recognized, Dr. Kevorkian's intent in providing such medication was to ease suffering, not cause death.

Although the Court of Appeals asserted that Dr. Kevorkian's argument was without support, there is substantial precedent permitting the recognition of Constitutional rights to privacy and bodily integrity, and substantial precedent demonstrating

that, under the Constitution, forcing a person to endure unbearable pain is prohibited, although the humane end of death is not. Therefore, this Court should accept the instant Application in order to squarely address whether there is a Constitutional right to be free from unbearable pain and suffering, and, if there is such a right, what the contours of that right are.

III. THE INSTANT APPLICATION SHOULD BE GRANTED BECAUSE THE PROSECUTOR'S IMPERMISSIBLE COMMENTS ABOUT DR. KEVORKIAN'S DECISION NOT TO TESTIFY DEPRIVED DR. KEVORKIAN OF HIS RIGHT AGAINST SELF-INCRIMINATION, AS GUARANTEED BY THE CONSTITUTION AND LAWS OF THE STATE OF MICHIGAN, AND THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

A. *The Court of Appeals Failed to Implement the Proper Standard of Review for a Constitutional Issue.*

The Court of Appeals erroneously held that Dr. Kevorkian failed to preserve this issue for review, and thus reviewed it only for plain error which affected defendant's substantial rights. On the contrary, Dr. Kevorkian properly preserved this issue for review by raising it in the Trial Court in his Motion for a Mistrial. March 26, 1999 A.M. Tr. of In Chambers Proceedings at 3-13. In any event, any failure to preserve this issue for review prior to said Motion for Mistrial is the fault of Gorosh, and further evidences his failure to

provide effective assistance. Indeed, although Gorosh sat at counsel table while the Prosecutor made the egregious comments about Dr. Kevorkian's right not to testify, *Gorosh failed to object or to instruct Dr. Kevorkian to object.* Therefore, in the interests of justice, this Court should consider this issue under the standards set forth below[8].

Under the Michigan Constitution, whether a prosecutor's comments about a defendant's decision not to testify amount to error so grievous as to necessitate a mistrial is left to the discretion of the trial judge, and such decision is reviewed under an abuse of discretion standard. *People v. Jansson*, 116 Mich. App. 674, 690; 323 N.W.2d 508 (1982).

As to the Fifth Amendment to the United States Constitution, the Sixth Circuit has explained its criteria for examining indirect references by a prosecutor to a defendant's failure to testify. The reviewing court must examine four factors: (1) were the comments intended to reflect on the accused's silence or of such a character that the jury would naturally and necessarily take them as such; (2) were the remarks isolated or extensive; (3) was the evidence of guilt otherwise overwhelming; and (4) what curative instructions were given and when. *Lent v. Wells*, 861 F.2d 972, 975 (6th Cir. 1988). The statements must be viewed in context, "not singled out and standing alone," and in the aggregate. *Id.* at 976; *Berryman v. Colbert*, 387 F.Supp. 378, 380 E.D. Mich. 1974).

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8. Even if this Court chooses to employ the "plain error" standard, the Prosecutor's comments clearly affected Dr. Kevorkian's substantial Constitutional right not to testify and therefore such comments do in fact amount to plain error.

If the reviewing court determines that there was error, it must then determine if the error was harmless. *Lent*, 861 F.2d at 975. "Harmless error, in the context of the violation of a Constitutional Right of a defendant is an *extremely narrow* standard permitting the state to avoid retrial of a defendant only when it can *demonstrate beyond a reasonable doubt that the error did not contribute in any way to the conviction of the defendant*." *Id.* at 977 (emphasis added). The reviewing court must make a determination whether, absent the prosecutor's allusion to the accused's failure to testify, it is clear *beyond a reasonable doubt* that the jury would have returned a verdict of guilty. *United States v. Hastings*, 461 U.S. 499, 510-511 (1982). Indeed, in *Lent*, although the Sixth Circuit agreed the case was certainly strong enough to find a defendant guilty, it held that the state had still not demonstrated *beyond a reasonable doubt* that the Constitutional error was harmless. *Lent*, 861 F.2d at 977. The Court of Appeals' refusal to evaluate this issue under the proper standard of review mandates that this Court grant the instant Application in order to do so.

B. *The Prosecutor's Impermissible Comments Violated Dr. Kevorkian's Rights Under the Constitution of the United States as well as the Constitution and Laws of the State of Michigan.*

Although the Court of Appeals acknowledged the clear precedent affirming that no comment be made with respect to a defendant's decision to assert his Constitutional right not to testify, it erroneously asserts, without support, that such precedent is inapplicable where a defendant proceeds *in propria persona*.

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The Court of Appeals relies upon a decision of this Court, *People v. Marcus Jones*, 442 Mich. 893; 499 N.W.2d 344 (1993), to support its erroneous assertion that a Prosecutor, in making objections, may comment upon the accused's right not to testify. In *Marcus Jones*, this Court refused to grant defendant a new trial where defendant was warned by the trial court to cease interrupting the prosecution's closing. The trial court warned defendant that he "had an opportunity to testify." *Id.* at 894. This Court determined that the trial court's response was a proper, though awkward, response to defendant's interruptions.

In the case at bar, it was the Prosecutor who interrupted Dr. Kevorkian. The Prosecutor, who is undoubtedly well-versed with respect to a defendant's Fifth Amendment right, could have simply objected without explanation, or sought a bench conference out of the presence of the jury. Instead, on more than five occasions, the Prosecutor used his objections as an excuse to interject, in front of the jury, that Dr. Kevorkian had chosen not to exercise his Constitutional right not to testify[9].

The Court of Appeals stated that "published state precedent does not address the precise situation presented in this case." R. November 20, 2001 Order. Nonetheless, the Court of

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9. The Court of Appeals also purported to rely upon cases from other jurisdictions, which have no precedential value, and in fact contradict the holdings of this Court which scrupulously protect a defendant's absolute right not to testify. Indeed, the Court of Appeals, in light of its erroneous decision, had no choice but to rely upon such foreign precedent because ***no decision of this Court has ever held that a prosecutor may comment upon a defendant's right to remain silent.***

Appeals explicitly stated that it was *not* basing its conclusion upon any purported waiver of Defendant's Constitutional privilege against self-incrimination resulting from Defendant's purported decision to proceed *pro se*. R. November 20, 2001 Op. at 40. As the Court of Appeals conceded, Dr. Kevorkian did *not* waive his right not to testify, and he is therefore entitled to the *full protection* guaranteed him by the United States and Michigan Constitutions. It is therefore inexplicable why the extensive binding precedent of this Court and the United States Federal Courts, including the United States Supreme Court, which clearly forbids the prosecution from commenting upon a defendant's right not to testify is not *fully applicable to the case at bar*. At a minimum, this Court should grant the instant Application in order to delineate the boundaries of the Constitutional right not to testify in the context of *pro se* representation, and determine the interaction between these two Constitutional rights.

The Fifth Amendment to the United States Constitution states, "No person . . . shall be compelled to be a witness against himself." U.S. Const. Am. V. This provision was made applicable to the states via the Fourteenth Amendment in *Malloy v. Hogan*, 378 U.S. 1, 6 (1964). The right of an accused not to be punished for the exercise of his Fifth and Fourteenth Amendment right to remain silent is a federal right, to be protected in accordance with the decisions of the Supreme Court and the lower federal courts. *Chapman v. California*, 386 U.S. 18, 21 (1967).

In *Griffin v. California*, 380 U.S. 609, 615 (1965), the United States Supreme Court held that the prosecution may not comment on the accused's silence, expanding on

the general rule set forth in *Miranda v. Arizona*, 384 U.S. 436 (1966), that the prosecution may not use at trial the fact that the accused claimed his privilege against self-incrimination in the face of accusation. Any comment by the prosecution on the refusal of the accused to testify is a remnant of the inquisitorial system of criminal justice, outlawed by the Fifth Amendment. *Griffin*, 380 U.S. at 614. Permitting such comment by the prosecution amounts to an impermissible penalty imposed by courts on the exercise of a constitutional privilege. *Id.* Whether a jury may draw a negative inference *on its own* from the accused's failure to testify is vastly different than the court solemnizing such silence into evidence against the accused, and such court action is prohibited. *Id.*

Furthermore, the United States Supreme Court, in construing the right of a person to remain silent has stated flatly that a person may "suffer *no penalty* . . . for such silence." *Malloy*, 378 U.S. at 8 (emphasis added). *Accord, Spevack v. Klein*, 385 U.S. 511, 514 (1966). A penalty for silence includes the "imposition of *any sanction* which makes assertion of the Fifth Amendment privilege costly." *Id.*, 385 U.S. at 515 (citation omitted, emphasis added). The United States Supreme Court has cautioned that even the *slightest* encroachments on Constitutional rights are prohibited, and the privilege against self-incrimination is to be construed *liberally*. *Id.* at 515-516. *See also, Coppola v. Powell*, 878 F.2d 1562, 1566 (1st Cir. 1989) (the privilege against self-incrimination should be given liberal application).

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> It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely by silent approaches and *slight deviations* from legal modes of procedure. *This can be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed.* A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. *It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealth encroachments thereon. Spevack*, 385 U.S. at 515 (citation omitted, emphasis added).

Thus, courts must guard against even the subtlest implications by the prosecution alluding to the accused's decision to exercise his Fifth Amendment right. *Id.*

Similar to the Fifth Amendment, Article I, § 17 of the Michigan Constitution states, "No person shall be compelled in any criminal case to be a witness against himself." Michigan statutes also embody the privilege against self-incrimination. MCL § 600.2154 requires that a witness answer questions, but provides the explicit exception that "this provision shall not be construed to require a witness to give any answer which will have a tendency to accuse himself of any crime or misdemeanor." MCL § 600.2159 states, "[A] defendant in any criminal case or proceeding shall only at his own request be deemed a competent witness, and his

neglect to testify shall not create any presumption against him, *nor shall the court permit any reference or comment to be made to or upon such neglect.*" (emphasis added).

Furthermore, this Court has held that Michigan is aligned with those states which give the constitutional provision against self-incrimination a liberal construction. *Moll v. Danzinger*, 238 Mich. 39, 42; 213 N.W. 448, 449 (1927) (referring to Art. 2, § 16 of the 1908 Michigan Constitution, which is identical to the current Michigan Constitutional provision against self-incrimination). Under Michigan law, it is the duty of the courts to liberally construe the prohibition against self-incrimination in favor of protecting personal rights, and to refuse to permit any steps tending towards their invasion. *Id.* This Court has further held that "safeguards against self-incrimination are to be *vigilantly and vigorously protected.*" *People v. Joseph*, 384 Mich. 24; 179 N.W.2d 383, 388 (1970) (emphasis added).

It is well-settled under Michigan law that comment by a prosecutor upon a defendant's right to remain silent constitutes clear error. *Jansson*, 116 Mich. App. at 690. The Court of Appeals has made clear that criminal defendants have a right to remain silent at trial, and *no references or comments are to be made to subvert that right*. *People v. Balog*, 56 Mich. App. 624, 629; 224 N.W.2d 725 (1974). The Court of Appeals has further made clear that it is impermissible to inform the jury that defendant has exercised his right to remain silent. *People v. Bell*, 32 Mich. App. 375; 188 N.W.2d 909 (1971).

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In the case at bar, the Prosecution violated Dr. Kevorkian's constitutional rights under federal and state law when the Prosecutor made comments during the trial which were clearly of such a character that the jury would naturally and reasonably take them as a reference to Dr. Kevorkian's Constitutionally protected decision not to testify. Whether the jury would naturally construe the comments to reflect on Dr. Kevorkian's failure to testify requires a probing analysis of the context of the comments, and the likely effects of any curative instruction given by the Trial Court. *See*, *Lent*, 861 F.2d at 977.

By closely examining the comments made by the Prosecutor, it is clear that the jury would understand that the Prosecutor was in fact repeatedly referring to Dr. Kevorkian's failure to testify. During Dr. Kevorkian's closing argument, the Prosecutor made at least four comments in a very short period of time, referring to Dr. Kevorkian's failure to testify. The Prosecutor said, "*He can't testify now. He can't tell the facts now.*" March 25, 1999 Tr. Vol. III at 50. (emphasis supplied). The Prosecutor objected again a short time later saying, "He cannot put facts before the jury *which have not been proven before through testimony or other evidence. He cannot testify now.*" *Id.* at 53. (emphasis supplied). The Prosecutor continued to state "[the defendant] *could have gotten on — you know, he didn't.*" *Id.* at 54. (emphasis added). Although the Prosecutor did not use the word "stand" everyone in the courtroom was able to fill in the blank with the word "stand" since that is the natural and expected finish of the Prosecutor's sentence. Any juror was able to extrapolate this especially in light of the clear context of the Prosecutor's comments that Dr. Kevorkian "cannot testify now," but "could have" and "didn't."

Finally, the Prosecutor went on to object saying, "*He's now testifying. He's putting new facts before the jury. He can't do that.*" *Id.* (emphasis supplied). In addition to these inappropriate comments, the Prosecutor also pointed out during his closing that "[Dr. Kevorkian] turns the videotape off and he goes back to work apparently. We don't know exactly what he does. And why does he turn it off? Why doesn't he keep the whole thing on all the time." March 25, 1999 Tr. Vol. III at 32 (Skrzynski). This too is an indirect but clear reference to the lack of answers due to Dr. Kevorkian's Constitutionally protected decision not to testify.

Although the Court of Appeals ruled that the Prosecutor's objections were appropriate because Dr. Kevorkian sought to put facts before the jury to which he had not testified, the Prosecutor took the very same tact, providing reasons for Dr. Kevorkian's behavior even though there was no evidence in the record to support such reasons. For instance, the Prosecutor asserted that Dr. Kevorkian's "entire mission" was to get the consent form signed and that Dr. Kevorkian "had a plan." March 25, 1999 Tr. Vol. III at 29 (Skrzynski). The Prosecutor also argued that Dr. Kevorkian did not find out anything about Thomas Youk or his condition. *Id.* The Prosecutor also argued that Dr. Kevorkian "pick[ed]" Thomas Youk. *Id.* at 25. The very testimony which the Prosecutor objected to (that of the Youks), and which the Trial Court erroneously excluded, would have proven that these positions, asserted by the Prosecutor with no evidentiary support, were *patently false*. Furthermore, the Prosecutor's unsupported and unsubstantiated theories about Dr. Kevorkian's possible motives only served to further highlight the fact, in conjunction with the Prosecutor's other blatant comments, that Dr. Kevorkian had refused to take the stand, as is his right.

When viewed in this context, the remarks were extensive. The Prosecutor hammered the point home to the jurors that Dr. Kevorkian had not testified. Because of the short period of time in which all the comments were made (between pages 32-33 and then between pages 50-54 of the March 25, 1999 transcript), the message was crystal clear. Furthermore, these comments were made during closing argument, and were some of the last things jurors heard before retiring to deliberate. Simply put, it is reversible error to specifically refer to the failure of defendant to take the stand. *People v. Alexander*, 17 Mich. App. 497; 169 N.W.2d 652 (1969).

In *People v. Mancill*, 393 Mich. 132; 223 N.W.2d 289 (1974), this Court remanded for a new trial a case in which the prosecutor commented during summation that a defendant "does not have to take the stand at all and there are times when it is better if [he] did not take the stand." *Mancill*, 393 Mich. at 132. This Court held that "the prosecutor's conduct constituted a *serious infringement* upon defendant's constitutional rights," and granted a new trial. *Id.* (emphasis). The infringement was certainly no less serious here, and thus Dr. Kevorkian's rights must be protected by means of a new trial.

Similarly, the Sixth Circuit has held that even *indirect* references to the defendant's failure to testify are sufficient to require a new trial. In *Lent*, the prosecutor made repeated references in his closing argument to "uncontradicted evidence," where it was clear the only person who could contradict the referenced evidence was the defendant. *Lent*, 861 F.2d at 974-975. Specifically, the prosecutor stated that "[the defense attorney] is going to get up here and say, well, this could've

been, and that could've been. Well could've been didn't take the stand." *Id.* at 974. This is very similar to the statement in the case at bar in which the Prosecutor said the defendant "could have gotten on – you know, he didn't," and thus this alone mandates reversal. March 25, 1999 Tr. at 54.

The United States District Court for the Eastern District of Michigan, on a writ of habeas corpus, reversed a Court of Appeals decision, and ruled that the following statement by the prosecution during closing argument was impermissible. The prosecutor said, "Now finally, to establish the robbery murder, we are relying almost entirely upon circumstantial evidence. Nobody was there when the robbery took place. Nobody that we can bring here to testify. The defendant's here, yes, but we can't get them to testify." *Berryman*, 387 F.Supp. at 379. The Sixth Circuit held that this was "clearly improper argument" and "the bounds of legitimacy were transgressed." *Id.* at 380.

In this case, with the Prosecutor's comment that Dr. Kevorkian could have taken the stand as a backdrop, the jury perfectly well understood that each of the Prosecutor's numerous other comments about giving testimony directly related and referred to Dr. Kevorkian's Constitutionally protected decision to exercise his right not to testify. Therefore, these comments satisfy the standard established by the Sixth Circuit, and necessitate a new trial in order that Dr. Kevorkian's absolute Constitutional rights under Federal and State law be properly safeguarded.

Appendix E

IV. THE INSTANT APPLICATION SHOULD BE GRANTED BECAUSE DR. KEVORKIAN WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

A. *The Court of Appeals Erroneously Held that Gorosh Need Not Be Held to the Constitutional Standards Required For Effective Assistance of Counsel In His Roles as Advocate and Advisor to Dr. Kevorkian.*

As a threshold matter, in its November 20, 2001 Order, the Court of Appeals failed to address the Trial Court's refusal to grant to Dr. Kevorkian a *Ginther* evidentiary hearing regarding the performance of counsel, although Dr. Kevorkian specifically requested such a hearing in his Motion for New Trial. R. July 15, 1999 Opinion and Order. Therefore, it was impossible for the Court of Appeals, or the Trial Court, to make the proper fact-intensive inquiry necessary to properly evaluate Gorosh's performance as counsel.

Furthermore, the Court of Appeals' Opinion relies heavily upon the fact that Dr. Kevorkian purportedly chose to proceed *pro se* in order to avoid applying the proper Constitutional standard to Gorosh's performance. However, it was Dr. Kevorkian's wish to use a system of hybrid representation, a plan the Trial Court refused to properly consider, though it permitted this approach in practice[10].

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10. The Trial Court misconstrued the applicable law, and determined that a court cannot consider a request for hybrid

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March 19, 1999 Tr. at 12-14. While the Court of Appeals erroneously contends that Dr. Kevorkian sought to use his right to self-representation as both a "sword and a shield," this was not the case. The facts bear out that Dr. Kevorkian did *not* in fact, and never intended to, represent himself without relying upon assistance from counsel, and the Trial Court *permitted and encouraged this arrangement*. Indeed, it is undisputed that Gorosh acted as Dr. Kevorkian's advocate at times and as advisor at other times throughout the course of the proceedings, and as such, Dr. Kevorkian was entitled to the effective assistance of counsel as guaranteed by the Constitution, which he did not receive.

Although the Court of Appeals' Opinion emphasized the fact that the Court repeatedly asked Dr. Kevorkian if he was certain he wanted to proceed *pro se*, and claims that Dr. Kevorkian knowingly and voluntarily waived his right to counsel, this simply can not be the case. At the very times that the Trial Court was asking Dr. Kevorkian if he was certain he wanted to waive his right to counsel, it was *allowing* and *encouraging* Dr. Kevorkian to consult with and have the aid of counsel in the courtroom at counsel table and on written briefs. March 22, 1999 Tr. Vol. I at 8-10; March 23, 1999 Tr. of In Chambers Proceedings at 25-26; March 25, 1999 Tr. Vol. III at 3.

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representation. But under Michigan law as well as federal law, hybrid representation can be and has been allowed in appropriate situations. *See, e.g., People v. Ramsey*, 89 Mich. App. 22; 198 N.W.2d 811 (1972); *People v. Griffen*, 36 Mich. App. 368, 372; 194 N.W.2d 104 (1971); *United States v. Hill*, 526 F.2d 1019, 1024 (10th Cir. 1975); *United States v. Tutino*, 883 F.3d 60, 67 (2nd Cir. 1989), *cert. den.*, 493 U.S. 1081 (1990).

Indeed, in *Fowler v. Collins*, 253 F.3d 244, 246-247 (6th Cir. 2001), the Sixth Circuit reviewed defendant's application for habeas corpus relief on the basis that he had not given a knowing and intelligent waiver of his right to counsel. The Sixth Circuit granted the application finding that the Michigan Court's determination that defendant's waiver was knowing and intelligent was an *unreasonable* application of established Supreme Court precedent regarding knowing and intelligent waiver. *Id.* at 250. Specifically, the Sixth Circuit noted that in order "[t]o ensure that a defendant's waiver is made with eyes wide open, a judge must *thoroughly investigate* the circumstances under which the waiver is made." *Id.* at 249 (emphasis added).

The Sixth Circuit went on to hold:

> While the extent to which a court must probe into these elements in order to render a waiver of counsel proper varies from case to case, the court's *obligation to maintain the integrity of the Sixth Amendment remains constant.* A defendant's waiver of his right to counsel must be made on the record *knowingly*, *intelligently*, and *voluntarily*. *Id.* (emphasis added).

The Sixth Circuit further noted that:

> The fact that an accused may tell [the judge] that he is informed of his right to counsel and desires to waive this right does *not* automatically end the judge's responsibility. *Id.* at 250 (emphasis added).

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The Sixth Circuit noted that the failure of the Michigan trial court to have defendant sign a *written waiver*, as well as the trial court's apparent ignorance of defendant's *expressed concerns* regarding his lack of preparation for trial and defendant's statement that the indictment against him was complex, were factors which weighed against finding a knowing and intelligent waiver. *Id.*

In a recent unpublished opinion, the Court of Appeals itself addressed the issue of waiver of counsel in a case similar to the case at bar and determined that a waiver of the right to counsel can *not* be unequivocal where standby counsel is present. *People v. Favors*, Mich. Ct. of Appeals No. 215826 (August 28, 2001) (per curiam) (unpublished).

The Court of Appeals held:

> We first address the prosecutor's argument that defendant waived this issue by electing to represent himself at trial. At the beginning of trial, defendant's court-appointed counsel advised the court that defendant had filed a grievance against him and refused to talk to him. Counsel asked to withdraw from the case. Defendant told the court that counsel had not filed a motion for an independent DNA expert. Defendant also complained that a private investigator hired by counsel had not come to the prison to see him about possible defense witnesses. *After the court ordered the trial to continue with defense counsel in place, defendant asked if he could represent himself but stated that he wanted defense counsel to remain to assist him. The court*

allowed this, and the trial proceeded with defense counsel questioning prospective jurors and all witnesses and making opening and closing statements.

While the right of self representation is secured implicitly by U.S. Const, Am VI and explicitly under Const 1963, Art 1, § 13, the right is not absolute. *People v. Anderson*, 398 Mich. 361, 366; 247 N.W.2d 857 (1976). A defendant has either a right to counsel or a right to proceed *in propria persona*, but not both. *People v. Adkins* (After Remand), 452 Mich. 702, 720; 551 N.W.2d 108 (1996). A defendant must exhibit an intentional relinquishment of the right to counsel, and the courts should "indulge every reasonable presumption against waiver" of the fundamental right to counsel. Id. at 721 (citation omitted). A request for self representation must be unequivocal, and the defendant must assert his right to self representation knowingly, intelligently and voluntarily. *Id.* at 722. *A request to waive appointed counsel and proceed in propria persona does not qualify as unequivocal if conditioned with a request for standby counsel. People v. Dennany*, 445 Mich. 412, 446 (Griffin, J.), 458 (Boyle, J.); 519 N.W.2d 128 (1994).

Defendant did not unequivocally request to represent himself because he asked for counsel to remain with him. Therefore, defendant did not waive his right to representation. Moreover, defendant did not waive a claim of ineffective

assistance of counsel, as the prosecution suggests, by responding positively to trial court questioning near the end of trial regarding his satisfaction with counsel's performance. "*Because the appropriate inquiry is not the client's evaluation of counsel's performance, but rather whether counsel is a reasonably effective advocate, 'we attach no weight to either respondent's expression of satisfaction with counsel's performance at the time of his trial, or to his later expression of dissatisfaction.'* " *People v. Mitchell*, 454 Mich. 145, 151 n 6; 560 N.W.2d 600 (1997), *quoting*, *United States v. Cronic*, 466 U.S. 648, 657 n 21; 104 S Ct 2039; 80 L Ed 2d 657 (1984) (emphasis added)[11].

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11. In a contrary decision, also from this year, the Court of Appeals held that

[D]efendant contends that he was denied the right to the effective assistance of his *standby counsel* at trial. We hold that this claim is foreclosed. *Defendant had either a right to counsel or a right to represent himself at trial, but not both.* Defendant cannot use these competing rights as an appellate parachute. In choosing to represent himself at trial, defendant was held to the same standards of representation as an attorney and *he cannot now complain on appeal that the quality of his defense, even as assisted by standby counsel, amounted to a denial of "effective assistance of counsel."* *People v. Snyder*, Mich. Ct. of Appeals Nos. 221490, 222709 (May 1, 2001) (per curiam) (unpublished) (citations omitted, emphasis added).

Although Dr. Kevorkian presented the *Favors* case to the Court of Appeals and opposing counsel at oral argument (because such case was not available at the time this issue was briefed), the November 20, 2001 Opinion of the Court of Appeals fails to address either *Favors* or *Snyder*. The instant application should be granted so that this Court may resolve this conflict in opinions of the Court of Appeals.

Thus, according to the Court of Appeals' own reasoning in *Favors*, Dr. Kevorkian's waiver *could not* have been effective as to all aspects of representation, because, even as he waived his right to counsel, he continued to have counsel, with the Trial Court's approval. *Id.* Indeed, Dr. Kevorkian was under the impression that he was represented by counsel throughout the trial, and that his role was to be that of a mouthpiece to present information prepared by his counsel. March 22, 1999 Tr. Vol. 1 at 268; March 23, 1999 Tr. Vol. II at 137; March 23, 1999 Tr. In Chambers Proceedings at 12-13, 25-26.

Furthermore, pursuant to *Favors*, the Court of Appeals' assertion in its opinion that Dr. Kevorkian expressed satisfaction with his counsel holds *no weight* with respect to the Court's evaluation of whether Gorosh *in fact* provided effective assistance. In any event, although the Court of Appeals claims that Dr. Kevorkian "never brought any dissatisfaction with Gorosh to the trial court's attention," it nonetheless acknowledged that "[i]n response to the trial court's questioning, [Dr. Kevokorkian] first stated that he was *dissatisfied* with [his attorneys]," before he reversed his position upon prompting from the Trial Court. R. Nov. 21, 2001 Op. at 20, 26.

Dr. Kevorkian is guaranteed the right to effective assistance of counsel by both the United States and Michigan Constitutions. The Sixth Amendment to the United States Constitution guarantees an accused "the right . . . to have the assistance of counsel for his defense." U.S. Const., Am. VI. The Michigan Constitution similarly guarantees, "[i]n every criminal prosecution, the accused shall have . . . assistance of counsel for his defense." Const. 1963, Art. 1, § 20.

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It is well-settled that the right to counsel includes the right to effective assistance of counsel. *McMann v. Richardson*, 397 U.S. 759, 771, n.14 (1970). At issue here is not the denial of counsel, but the actual *performance* of counsel. *People v. Mitchell*, 454 Mich. 145, 156; 560 N.W.2d 600 (1997). The inquiry into the performance of counsel is particular, and the question is whether counsel's actual performance undermined confidence in the reliability of the result. *Id.*

As the Court of Appeals acknowledged, the benchmark case in Michigan describing the standards for claims of ineffective assistance of counsel is *People v. Pickens*, 446 Mich. 298; 521 N.W.2d 797 (1994). Therein, this Court adopted the federal test described in *Strickland v. Washington*, 466 U.S. 668 (1984), for reviewing claims of ineffective assistance of counsel. This Court determined that the Michigan Constitutional provision affords the same protection as the Sixth Amendment to the United States Constitution with regard to the guarantee of assistance of counsel. *Pickens*, 446 Mich. at 302.

In order to ascertain whether counsel's assistance was ineffective, the reviewing court must determine: (1) whether counsel's performance was objectively unreasonable; and (2) if so, whether the defendant was so prejudiced by counsel's defective performance that he was deprived of a fair trial. *Id.* at 309. The test requires the greatest level of factual inquiry into the *conduct* of the defense and its effect on the outcome of the trial. *Mitchell*, 454 Mich. at 155.

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Although the Court of Appeals refused to apply the *Strickland* standard to Gorosh's performance during trial, it provided no basis as to why this standard should not apply. In fact, under the Court of Appeals' logic, an attorney who provides only legal advice as an advisor during trial will not be held to any standard of professional conduct. This simply can not be the rule, and this Court should accept the instant application in order to set forth the proper standard for reviewing the performance of counsel who provides advice as well as advocacy.

In any event, Gorosh's assistance was inadequate under any conceivable meaningful standard of conduct due to numerous errors, miscalculations and breaches of professional responsibility. The detailed information received from Dwyer, Holmes, Schwartz and Dr. Kevorkian himself, as well as the affidavits submitted in support of Defendant's Motion For a New Trial reveal what actually happened during the pre-trial and trial proceedings, and serve to explain why the defense presented on behalf of Dr. Kevorkian was so inadequate.

The Court of Appeals acknowledged that Gorosh acted as an advocate for Dr. Kevorkian in presenting various pre-trial motions. *See, e.g.*, March 22, 1999 Tr. Vol. I at 8; R. Nov. 20, 2001 Op. at 24. In fact, Gorosh filed a formal notice of appearance, filed motions and briefs, responded to Prosecution motions and appeared at pre-trial hearings, including the preliminary examination, arraignment and the hearing wherein Gorosh moved to quash the assisted suicide count. *See*, R. December 17, 1998 Appearance; January 29, 1999 Mot. To Quash the Information; March 16, 1999 Def.'s Mot. For Recons.; February 12, 1999 Def.'s Resp. to Prosecution's

Mot. To Preclude Defenses; February 12, 1999 Def's Resp. to Prosecution's Mot. For Special Jury Instructions; February 12, 1999 Def.'s Resp. to Prosecution's Mot. To Modify; February 12, 1999 Def.'s Resp. to Prosecution's Mot. For Jury Instructions; February 12, 1999 Def.'s Resp. to Prosecution's Mot. To Preclude Definition; February 12, 1999 Def.'s Resp. to Prosecution's Mot. To Exclude Testimony; February 12, 1999 Def.'s Resp. to Prosecution's Mot. In Limine; December 9, 1998 Preliminary Examination Tr. at 3; December 16, 1998 Arraignment Tr. at 3; December 22, 1998 Tr. of In Chambers Proceedings at 3; February 1, 1999 Hearing Tr. at 3; February 16, 1999 Tr. of In Chambers Proceedings at 3; March 3, 1999 Mot. Tr. at 3, 56; March 12, 1999 Dismissal of Count II Tr. at 3; March 16, 1999 Mot. Tr. at 3-4; March 19, 1999 Hearing Tr. at 3.

It is further undisputed that Gorosh also acted as an advocate at times during the trial. For instance, Gorosh prepared and signed the Motion for Introduction of Thomas Youk's Medical Condition filed during trial, and Gorosh was present during in chambers conferences held during the trial. R. Def.'s Trial Mem. of Law; Def.'s Mot. For Recons.; March 23, 1999 Tr. of In Chambers Proceedings at 3; March 25, 1999 Tr. Vol. III at 3; March 26, 1999 A.M. Tr. of In Chambers Proceedings at 3; March 26, 1999 P.M. Tr. of In Chambers Proceedings at 3.

Even assuming *arguendo* that Gorosh did not act as Dr. Kevorkian's advocate during the trial, which he did, it is undisputed that Gorosh *at least* acted as a counselor and advisor to Dr. Kevorkian. The Trial Court required Gorosh to sit at counsel table and instructed Dr. Kevorkian to seek

advice from his attorneys on numerous occasions. March 22, 1999 Tr. Vol. I at 10-11, 237, 247, 268; March 23, 1999 Tr. Vol. II at 95, 98, 101, 145; March 23, 1999 In Chambers Proceedings Tr. at 25-27; March 25, 1999 Tr. Vol. III at 3. Dr. Kevorkian even indicated his intent to follow the advice of his advisers throughout the trial. March 23, 1999 Tr. In Chambers Proceedings at 12-13. In that capacity, Gorosh was obligated to provide, and Dr. Kevorkian was entitled to receive, effective advice and consultation as to how to conduct his own defense in accord with the Constitutional guarantee of effective assistance of counsel.

The Michigan Rules of Professional Responsibility (the "Rules") set forth certain minimum standards for the conduct of counsel as advocate and advisor. The Rules detail a lawyer's duties as both advisor and advocate, recognizing that similar duties and responsibilities apply to both roles. As an advisor, "a lawyer provides a client with an *informed understanding of the client's legal rights and obligations and explains their practical implications*." MRPC 1.0, *comment* (emphasis added). As an advocate, "a lawyer zealously asserts the client's position under the rules of the adversary system." *Id.* A lawyer also must be competent, prompt and diligent in all professional functions. *Id.* In addition, in order to meet the Constitutional standard, defense counsel must perform at least as well as a lawyer with ordinary skill in the criminal law, and must *conscientiously protect his client's interests*. *People v. Garcia*, 398 Mich. App. 250, 264; 247 N.W.2d 547 (1976).

Here, Gorosh did not perform as well as a lawyer with ordinary skill in criminal law, and he certainly did not conscientiously protect his client's interests. Gorosh abdicated his roles, and did not provide Dr. Kevorkian with appropriate advice or advocacy. In fact, Gorosh was at odds with his client throughout most of the representation. R. New Trial Br., Exh. A at 3.

First, Gorosh was not qualified to handle the defense of Dr. Kevorkian, who was charged with a serious criminal offense, carrying a maximum penalty of imprisonment for life. The Rules state,

> A lawyer shall provide competent representation to a client. A lawyer shall not:
>
> (a) handle a legal matter which the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it; [or]
>
> (b) handle a legal matter without preparation adequate in the circumstances. MRPC 1.1.

According to co-counsel, Dwyer, and Gorosh's former employer, Schwartz, Gorosh was not competent to handle the case, nor to prepare and aid Dr. Kevorkian in presenting his own defense[12]. R. New Trial Br., Exhs. A at 2, 4-5, B at 3-6.

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12. Although the Court of Appeals dismissed Dr. Kevorkian's argument with respect to the competency of Gorosh to handle this matter on the ground that Gorosh had previously been associated with "a law firm and lawyers who had substantial experience with

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Gorosh had minimal experience inasmuch as he had only been practicing for three years. R. New Trial Br., Exh. B at 1-2. He had limited trial experience, and had *never* defended a felony case, much less a homicide. *Id.*

The poor decisions and trial strategies implemented by Gorosh reveal his inexperience and inability to grasp important strategic considerations. For example, despite the advice of co-counsel, Dwyer, Gorosh moved to quash the assisted suicide count. R. New Trial Br., Exhs. A at 2; C at 3. While the Court of Appeals dismissed this claim as without merit because the Prosecution ultimately dismissed the assisted suicide charge on its own motion and Gorosh "had no influence over the prosecutor's decision to take this action," the motion to quash the assisted suicide count (which the Prosecution opposed) was precisely what brought this issue to the Prosecutor's attention. R. New Tr. Br., Exh. B at 3-4. The Prosecution had in fact argued to *retain* the assisted suicide charge until Gorosh's decision to bring the ill-founded Motion to Quash caused the consequences of retaining such charge to become clear to the Prosecution. March 3, 1999 Tr. at 15-19. Indeed, Judge Cooper explicitly told Gorosh that eliminating the assisted suicide count would lead to the exclusion of testimony about the suffering of Thomas Youk's family and about Thomas Youk's medical condition, and Judge Cooper was baffled by Gorosh's "strategy"

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[Dr. Kevorkian] and the similar prosecutions instituted against him," there is no evidence that Gorosh was in any way associated with any law firm in connection with the case, and in fact Gorosh refused to heed the advice of senior partners at his former firm. In addition, Schwartz, a senior partner at Gorosh's former firm, testified that Gorosh was not competent to handle a case of this magnitude.

to challenge the assisted suicide count in lieu of the murder count. March 3, 1999 Motion Hearing Tr. at 12-13 (Court).

Second, Gorosh *prepared no defense whatever* for his client, Dr. Kevorkian, which can not possibly be considered competent representation under any definition. In fact, Gorosh did not even challenge the cause of death of Thomas Youk, although there was significant evidence to support raising this defense due to Thomas Youk's advanced stage of ALS, a fatal disease. ALS was listed as a significant contributing factor on the amended death certificate, and Thomas Youk may very well have passed away prior to any actions of Dr. Kevorkian when Mr. Youk gasped, as revealed on the videotape. March 23, 1999 Tr. Vol. II at 75-78, 90-91 (Dragovic); March 25, 1999 Tr. Vol. III at 63 (Skrzynski).

Third, Gorosh did not even interject or instruct Dr. Kevorkian to make appropriate objections during trial, even though co-counsel, Dwyer, admonished him to do so. Gorosh sat idly by as inappropriate comments were made in the presence of the jury including impermissinble comments about Dr. Kevorkian's right not to testify, knowing full well that Dr. Kevorkian did not have the legal training and understanding to make the objections on his own. *See, e.g.*, March 25, 1999 Tr. at 50-54. The Sixth Circuit has made clear that the failure of a defendant's counsel to object to substantial improprieties[13] committed by the prosecutor

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13. Specifically, the Sixth Circuit identified the prosecutor's recitation of the bad character of defendant during closing, the prosecutor's argument that the crime alleged somehow "fit" the evidence of defendant's bad character, and the prosecutor's argument

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amounts to conduct far below the *Strickland* standard for effective assistance of counsel. *Washington v. Hofbauer*, 228 F.3d 689, 702 (6th Cir. 2000). The Sixth Circuit further found that such comments by a prosecutor amount to unfair and prejudicial misconduct which *requires* an objection. *Id.* at 703. The Court determined that the defendant's counsel's failure to object to such statements by the prosecutor constitutes "incompetence and *ignorance of the law*" rather than any plausible trial strategy. *Id.* (emphasis added). The Court further ruled that such a performance can not be deemed "objectively reasonable" because such a characterization would eviscerate the *Strickland* standard, rendering it nothing more than a "generous apology for the clearest of errors." *Id.* at 705.

It was Gorosh's duty as an attorney to protect the rights of his client, regardless of whether Gorosh was acting as advisor or advocate at the time. Dr. Kevorkian needed help as to the proper objections to raise, and as to trial procedure, which is precisely the reason the Trial Court required Gorosh to sit at counsel table. This is the very sort of legal help and advice Gorosh, as lead defense counsel, was obligated and expected to give his client in his role as advisor.

Fourth, Gorosh allowed his relationship with his client, Dr. Kevorkian, to deteriorate to such a point that it was impossible for Gorosh to provide effective assistance. Gorosh's conversations with his client, Dr. Kevorkian, were reduced

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that the victim's account of the crime had been consistent over time, though there was no evidence in the record to support such an assertion, were all improper.

to shouting matches prior to trial. R. New Trial Br., Exh. A at 3. Gorosh refused to allow Dr. Kevorkian to have the counsel of his choice inasmuch as Gorosh indicated Dwyer could not conduct the trial, despite Dr. Kevorkian's wishes that she do so[14]. *Id.* Furthermore, despite Dr. Kevorkian's specific instructions that the other young lawyer was not to be part of the legal team, Gorosh continued to keep the other lawyer present. R. New Trial Br., Exhs. A at 3; C at 3.

Fifth, Gorosh did not maintain adequate communication with Dr. Kevorkian. Rule 1.4 states, "[a] lawyer shall keep a client reasonably informed about the status of a matter and comply promptly with reasonable requests for information." MRPC 1.4(a). A lawyer should maintain communication with a client concerning representation. MRCP 1.0, *comment*. Although Gorosh met with Dr. Kevorkian from time to time to discuss the case, he merely falsely assured Dr. Kevorkian that everything was being handled, though clearly it was not. R. New Trial Br., Exh. C at 2. Gorosh, did not respond to Dr. Kevorkian's requests for information despite Dr. Kevorkian's repeated inquiries, and never even showed Dr. Kevorkian a complete witness list. R. New Trial Reply Br., Exh. A at 1.

Sixth, Gorosh's behavior in the courtroom was totally inappropriate[15]. A lawyer has a duty, in accord with his role as an advocate, to "act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." MRCP 1.3, *comment*; MRCP 1.0, *comment*. Gorosh's behavior at counsel table not only was injurious

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14. The Court of Appeals wholly failed to address this issue.

15. The Court of Appeals utterly failed to address this issue.

and prejudicial to his client because of the negative impact it may have had on the jury, but it was also undignified and discourteous. R. New Trial Br., Exh. A at 4, Exh. C at 3-4. It was wholly inappropriate for Gorosh to make gestures, roll his eyes or sigh while Dr. Kevorkian was presenting his case. Gorosh's behavior could only serve to draw the attention of the jury to Gorosh's doubts about his client's defense.

Seventh, Dr. Kevorkian was deprived of presenting favorable testimony because Gorosh did not properly prepare legal and factual reasons to present to the Court as to why such testimony should be permitted, as fully explained in Section V, *infra*.

Finally, the Prosecution was able to conduct direct examination of witnesses through leading questions and to make prejudicial and inappropriate statements to the jury, including, but not limited to, statements regarding Dr. Kevorkian's decision not to testify, statements regarding the penalty phase of the proceedings and statements regarding issues that had been stricken from the case such as intent and consent. Because Gorosh failed to object, or advise Dr. Kevorkian, a layman, to do so regarding the misconduct of the Prosecution, Dr. Kevorkian was deprived of a fair trial.

Appendix E

V. THE INSTANT APPLICATION SHOULD BE GRANTED BECAUSE DR. KEVORKIAN HAS AN ABSOLUTE RIGHT TO CALL ALL *RES GESTAE* WITNESSES IN HIS DEFENSE BUT WAS ERRONEOUSLY PROHIBITED FROM DOING SO.

A. *The Court of Appeals Erroneously Held that a Defendant does Not Have a Right to Call Res Gestae Witnesses in His Defense in Derogation of the Clear Precedent of this Court.*

The Trial Court clearly erred in its refusal to allow the testimony of Terry and Melody Youk (the "Youks"), the brother and wife of Thomas Youk, and the Court of Appeals clearly erred by affirming the Trial Court's erroneous decision.

First, it is undisputed that the Youks were *res gestae* witnesses. The Youks were listed on the Waterford Police Witness List. Addendum, Exh. A. Persons present at the scene of a "crime" are presumed to be *res gestae* witnesses able to testify regarding their observations. *People v. Brooks*, 96 Mich. App. 96, 98; 292 N.W.2d 139 (1980) (per curiam). The Prosecutor also included Youks as *res gestae* witnesses on Count II (delivery of a controlled substance) of the First Amended General Information (the "Information"). R. First Amended General Information. The Prosecutor even made reference to a telephone call Terry Youk made to Dr. Kevorkian on behalf of his brother, Thomas Youk. March 25, 1999 Tr. Vol. III at 31. Because the Prosecutor contends that both Counts I and II arise from the *same act* (the injection of a controlled substance into Thomas Youk which supposedly

caused his death), the same *res gestae* witnesses must necessarily be allowed to testify as to both counts. March 25, 1999 Tr. Vol. III at 19.

A *res gestae* witness is an eyewitness to *some event in the continuum of a criminal transaction* whose testimony would aid in the full disclosure of the facts surrounding the alleged commission of an offense. *The witnesses need not be an eyewitness to the actual crime. People v. Johnson*, 164 Mich. App. 634, 644 at n. 3; 418 N.W.2d 117 (1987) (emphasis added), *citing*, *People v. Baskin*, 145 Mich. App. 526, 530-531; 378 N.W.2d 535 (1985) (per curiam)[16]. *Accord*, *People v. Austin*, 95 Mich. App. 662, 674-675; 291 N.W.2d 160 (1980).

A *res gestae* witness is one whose testimony is necessary to illuminate an important area of the case. *People v. Johnston*, 76 Mich. App. 332, 337; 256 N.W.2d 782 (1977). Because all relevant evidence is admissible and a *res gestae* witness, by definition, can provide testimony which illuminates an important area of the case, a Defendant must be allowed to call a *res gestae* witness because his testimony is relevant[17].

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16. Although the *res gestae* witness statute has been amended and no longer requires that the prosecutor produce all *res gestae* witnesses, prior case law explaining the bases for the *res gestae* witness rule remains good law, and continues to be relied upon by the Court of Appeals itself. *See, e.g., People v. Bieri*, Mich. Ct. of Appeals Case No. 206707 (May 9, 2000) (per curiam) (unpublished).

17. Although the Court of Appeals, like the Prosecution, claimed that the Youks' testimony was inadmissible because such testimony would not have been relevant, this ground is clearly erroneous

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Id.; MRE 402. Whether a defendant has a right to call in his defense all *res gestae* witnesses is an evidentiary issue which should be definitively resolved by this Court[18].

The purposes of the testimony of *res gestae* witnesses is to protect the rights of the accused. Specifically, *res gestae* witnesses must be permitted to testify because they can present the *entire* transaction to the trier of fact, *protect the accused from false accusations* and *protect the accused from the suppression of testimony favorable to him*. *People v. Hernandez*, 84 Mich. App. 1, 13; 269 N.W.2d 322 (1978); *People v. Szymanski*, 52 Mich. App. 605, 610; 218 N.W.2d 95 (1974); *People v. Hicks*, 63 Mich. App. 595, 597; 234 N.W.2d 720 (1975).

(Cont'd)
inasmuch as the Prosecution has conceded that the testimony of Youks' would be relevant because the Prosecution listed the Youks as *res gestae* witnesses. The Prosecution conceded, as it must, that the Youks' were *res gestae* witnesses, yet still sought to deprive Defendant of his right to present all evidence which could shed light on the entire facts and circumstances of the alleged crime.

18. In any event, the Michigan Courts have recognized that the importance of presenting the entire "*res gestae*" of a crime to the trier of facts can sometimes trump even rules of evidence which would otherwise exclude certain *res gestae* evidence. *See, e.g., People v. Robinson*, 128 Mich. App. 338, 340; 340 N.W.2d 303 (1983) (holding that evidence of prior bad acts may admissible, notwithstanding MRE 404(b), where evidence of such bad acts are so blended with the charged offense that proof of one incidentally involves the other or explains the circumstances of the crime)

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In addition, a person need not be present at the scene of the crime to be a *res gestae* witness, so long as his or her testimony would assist in developing a *full disclosure of the facts and circumstances* surrounding the alleged crime. *People v. Reynolds*, 93 Mich. App. 516, 521; 286 N.W.2d 898 (1980); *Baskin*, 145 Mich. App. at 531. The *res gestae* witness rule encompasses not only eyewitnesses, but *all witnesses* whose testimony may aid in the making of a *fair presentation of the res gestae of the crime charged*. *Baskin*, 145 Mich. App. at 530-531, 535. *Every reasonable doubt as to whether a witness is a res gestae witness should be resolved in favor of indorsing and calling the witness*. *Austin*, 95 Mich. App. at 674; *People v. Doyan*, 116 Mich. App. 356, 363; 323 N.W.2d 397 (1982).

Indeed, the Youks were willing and able to testify to the facts and circumstances surrounding Dr. Kevorkian's interactions with Thomas Youk at and around the time of Thomas Youk's death. March 23, 1999 Tr. Vol. II at 122 (Melody Youk)[19]. Clearly their testimony would have probative value, and any doubts as to whether they were in fact *res gestae* witnesses must be resolved in favor of admitting their testimony. *Austin*, 95 Mich. App. at 674; *Doyan*, 116 Mich. App. at 363. The facts and circumstances to which the Youks could testify not only would shed light on the circumstances and context of the alleged acts, but also on Dr. Kevorkian's intent, which even the Prosecutor acknowledged must be determined "by the circumstances surrounding" what a person does. March 25 1999 Tr. Vol. III

19. The record shows that the offer of Proof for Terry Youk would be the same as that offered for Melody Youk. March 25, 1999 Tr. Vol. III at 6 (Dr. Kevorkian).

at 28. Under Michigan law, Dr. Kevorkian had an absolute right to call in his defense all *res gestae* witnesses, including the Youks. The Trial Court's refusal to permit Dr. Kevorkian to present to the jury all the facts and circumstances surrounding the alleged crime amounts to clear error which affected Dr. Kevorkian's right to present his defense.

The Court of Appeals held that the Prosecutor no longer has a duty to produce *res gestae* witnesses, but nonetheless ignored its own precedent which makes clear that, even if the Prosecution is not obligated to call all *res gestae* witnesses, this does not mean that the defense can be precluded from calling such witnesses. On the contrary, the fundamental purpose of the *res gestae* witness rule is to protect the rights of the accused. The accused therefore must be permitted to call all *res gestae* witnesses. Indeed, no further offer of proof was required where it was undisputed that the Youks were indeed *res gestae* witnesses to at least one of the offenses charged.

The Court of Appeals further asserted that Dr. Kevorkian was not entitled to call the Youks because their testimony purportedly related solely to the impermissible defense of consent. However, even if the Youks' testified as to Thomas Youk's consent, testimony relating to *all events which occurred in connection with the entire continuum of the alleged crime is admissible. Johnson*, 164 Mich. App. at n.3.

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B. ***The Youks' Testimony was Admissible for Several Other Reasons as Well Under the Michigan Rules of Evidence.***

Even if *res gestae* witnesses which the Defendant wishes to call could be excluded, which they can not for the reasons set forth above, the Youks' testimony should have been admitted for other reasons as well.

First, the Youks' testimony was relevant as to Thomas Youk's cause of death. Gorosh could and should have challenged the cause of death because there was evidence introduced which raised the issue, and Thomas Youk suffered from a fatal disease, the effects of which could have caused death at any time[20]. The Youks were personally aware of the physical condition of Thomas Youk, the progression of his ALS and Thomas Youk's various potentially fatal symptoms resulting from the ALS. Even the Prosecutor conceded that Thomas Youk suffered from a "terrible disease" and that he was "very sick." March 22, 1999 Tr. Vol. I at 254 (Mr. Skrzynski). As Thomas Youk's closest family members, Terry and Melody Youk were aware that Thomas Youk was near death, and, sadly, could have passed away at any moment. The Youks knew this from their personal observation of Thomas Youk, as well as direct communications with Thomas Youk's physicians and hospice caregivers. While the Prosecutor claimed there was no evidence that Thomas Youk was

20. Gorosh's failure to do this represents a part of the ineffective assistance he provided to Dr. Kevorkian. The Court of Appeals insistence upon viewing each issue raised by Dr. Kevorkian in a vacuum, despite the interrelationship of all such issues with Gorosh's failure to provide effective assistance, was erroneous.

afraid of choking, despite Dr. Kevorkian's statements in the "60 Minutes" videotape, (People's Trial Exh. 2), Melody and Terry Youk would have testified that Thomas Youk was in fact very afraid of choking.

In fact, even the Trial Court recognized that challenging the cause of death would be an appropriate defense. March 19, 1999 Tr. In Chambers Proceedings at 33 (Court). Gorosh indicated he might challenge the cause of death, but then failed to do so, and failed to advise Dr. Kevorkian to do so, even though this is a fundamental defense strategy in a murder trial inasmuch as the requirement that the accused caused the death of the decedent is a requisite element of murder. *Id.* at 21-23 (Gorosh). The Youks' testimony as to Thomas Youk's deteriorating medical condition would have been relevant to this defense.

Second, the Prosecutor argued throughout the trial that the purpose behind Dr. Kevorkian's making the videotape was for publicity and to advance his own personal agenda. March 22, 1999 Tr. Vol. I at 255 (Skrzynski); March 25, 1999 Tr. Vol. III at 29-30, 41-42, 45 (Skrzynski). The Prosecutor made numerous statements and implications about Dr. Kevorkian's motives, and his "insensitivity" to Thomas Youk. March 25, 1999 Tr. Vol. III at 25-26, 29-32, 34-39, 41, 45, 63-65. The Youks would have contradicted this, and testified to Dr. Kevorkian's sensitivity, and that his actual purpose in making the videotape was to show the consent of Thomas Youk to receive the treatment of Dr. Kevorkian as protection from possible prosecution as to the Youks. In addition, the Youks would have testified that Dr. Kevorkian could have chosen to forward his personal agenda through Thomas Youk because it was Thomas Youk who contacted Dr. Kevorkian.

Third, the Prosecution argued lack of consent, although Dr. Kevorkian was precluded from introducing any evidence as to Thomas Youk's consent. March 25, 1999 Tr. Vol. III at 26, 29-30 (Skrzynski). Specifically, the Prosecution stated that Thomas Youk was a victim sought out by Dr. Kevorkian, and that Dr. Kevorkian arrived like a "medical hit man." *Id.* at 64-65. The Youks would have testified that Thomas Youk was not a victim, and in fact it was Thomas Youk who sought out Dr. Kevorkian in an effort to alleviate his pain and suffering. March 23, 1999 Tr. Vol. II at 122 (Melody Youk). Based upon the Youks' conversations with both Thomas Youk and Dr. Kevorkian, the Youks could have testified to the states of mind of both Thomas Youk and Dr. Kevorkian in order to rebut the Prosecutor's charges that Thomas Youk was a victim. March 25, 1999 Tr. Vol. III at 64-65 (Skrzynski). Such testimony was admissible as an exception to the hearsay rule as a then-existing mental, emotional, or physical condition under MRE 803(3). Dr. Kevorkian was precluded from presenting this evidence in his defense, while the Prosecutor was permitted to raise these issues without contradiction.

In fact, Melody Youk should have been allowed to testify as to the contents of any conversation she heard between Thomas Youk and Dr. Kevorkian. March 23, 1999 Tr. Vol. II at 122 (Melody Youk). It is elementary that such conversations are exceptions to the hearsay rule as statements made for the purposes of obtaining medical treatment or diagnosis. MRE 803(4). Melody Youk explicitly stated in her offer of proof that she, Thomas Youk and Dr. Kevorkian discussed what services Dr. Kevorkian could render for Thomas Youk *as a physician*. March 23, 1999 Tr. Vol. II at 122. Likewise, any comment Thomas Youk made in Melody

Youk's presence about his physical condition is admissible under this same rule. MRE 803(3). In fact, any statement made by Thomas Youk is also admissible as an exception to the hearsay rule as a statement under belief of impending death, inasmuch as Thomas Youk was suffering from the final stages of a fatal disease. MRE 804(b)(2); March 23, 1999 Tr. Vol. II at 75-78, 90-91 (Dragovic). Such a statement is admissible in a homicide prosecution, and Thomas Youk certainly believed his death was imminent. *Id.*

Finally, Melody Youk could have rebutted numerous statements made by the Prosecution. For instance, the Prosecution claimed Dr. Kevorkian brought "a pretty large piece of equipment." March 25, 1999 Tr. Vol. III at 31 (Skrzynski). Melody Youk saw this piece of equipment firsthand. The Prosecution implied some sinister purpose behind the fact that Dr. Kevorkian turned off the videotape stating, "[Dr. Kevorkian] turns off the videotape . . . and we don't know . . . what Dr. Kevorkian is doing in the meantime." *Id.* at 32-33. Melody Youk could have explained the reasons Dr. Kevorkian turned off the videotape, and what did go on in the meantime because she was there. The Prosecution claimed that Thomas Youk gasped and attempted to say something after Dr. Kevorkian administered the sedative. *Id.* at 63. The Prosecution suggested that Thomas Youk said "Wait." *Id.* However, it is just as likely that this sound was common for Thomas Youk due to his illness, or that it represented Thomas Youk's death throes *from ALS* and had nothing to do with Dr. Kevorkian's actions. Melody Youk would have shed light on these issues because she was familiar with the sounds made by Thomas Youk resulting from his illness and otherwise.

VI. THE INSTANT APPLICATION SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS FAILED TO ADDRESS NUMEROUS OTHER CLEAR ERRORS WHICH OCCURRED DURING THE TRIAL, EACH OF WHICH PREJUDICED THE SUBSTANTIAL RIGHTS OF DR. KEVORKIAN.

The Court of Appeals has held that it will reverse when plain errors have resulted in the conviction of an innocent defendant, have prejudiced the defendant, or have affected the fairness, integrity, or public reputation of judicial proceedings independent of the defendant's innocence. *People v. Carines*, 460 Mich. 750, 761-762; 597 N.W.2d 130, 138 (1999) (citation omitted). Reversal is required where: (1) the error occurred; (2) the error was clear or obvious; and (3) the plain error affected substantial rights. *United States v. Olano*, 507 U.S. 725 (1993). Despite this clear precedent, in the instant case, the Court of Appeals failed to even address Dr. Kevorkian's claims of clear error. This Court should grant the instant application for leave to appeal in order to correct these plain errors which affected Dr. Kevorkian's substantial rights

As shown below, numerous clear and obvious errors occurred during the trial which affected Dr. Kevorkian's right to a fair trial.

First, the Prosecutor impermissibly made mention of possible penalty in his closing argument by indicating that Michigan does not have the death penalty. March 25, 1999 Tr. Vol. III at 45-46 (Skrzynski). *Id.* The general rule is that counsel should not address the question of disposition upon

conviction. *People v. Turner*, 99 Mich. App. 733, 742; 298 N.W.2d 848 (1980), *citing*, *People v. Szczytko*, 390 Mich. 278, 285; 212 N.W.2d 211 (1973).

Second, the Prosecutor repeatedly asked impermissible leading questions of witnesses during direct examination of witnesses in violation of MRE 611(C)(1). *See*, *e.g.*, March 23, 1999 Tr. Vol. II at 77 ("Dr. Pacris did that, didn't he?"), 78 ("Now you amended the death certificate again, did you not, after the examination on the brain and the spinal cord?"), 79 ("Could he have died earlier than the day before?") (Skrzynski).

Third, the Trial Court should have requested that Gorosh cease his disrespectful behavior in the Court Room. Gorosh was visibly rolling his eyes and putting his head in his hands, and audibly sighing and making comments under his breath during Dr. Kevorkian's presentation. R. New Tr. Br., Exhs. A at 4, C at 4.

Finally, the Prosecutor impermissibly compared Dr. Kevorkian's act of easing the pain and suffering of Thomas Youk resulting from a fatal disease to a mother seeking to kill her Down's Syndrome child, and a teenage girl contemplating suicide because of trouble with her boyfriend. March 25, 1999 Tr. Vol. III at 65-66 (Skrzynski). The Prosecutor further impermissibly commented about making euthanasia a State policy, and asserted that eleven million people in Europe have died as a result of such a policy. *Id.* at 66-67. A prosecutor "may not intentionally inject inflammatory arguments with no apparent justification except to arouse prejudice." *People v. Lee*, 212 Mich. App. 228, 247; 537 N.W.2d 233 (1995), *citing*, *People v. Bahoda*, 448 Mich.

261, 266; 531 N.W.2d 659 (1995). Parties are entitled to a fair trial on the merits, "uninfluenced by appeals to passion or prejudice." *Board of County Rd. Comm'rs v. GLS LeasCo, Inc.*, 394 Mich. 126, 131; 299 N.W.2d 797 (1975) (citation omitted). The Prosecutor's comments were highly prejudicial, irrelevant, without support in the record, and introduced solely to inflame the passions of the jurors.

CONCLUSION AND RELIEF SOUGHT

For all the foregoing reasons, Dr. Kevorkian respectfully requests this Honorable Court to grant the instant Application, or, in the alternative, (1) dismiss the charges against Dr. Kevorkian in their entirety based on the Constitutional issues herein raised by Dr. Kevorkian; or (2) vacate the verdict and Judgment of Sentence and remand to the Trial Court based upon the errors in the trial proceedings that deprived Dr. Kevorkian of a full and fair trial.

Respectfully submitted,
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Dated: December 11, 2001

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THE STATE OF MICHIGAN
COURT OF APPEALS DECISION
attached hereto as an Addendum appears at
pages 7a — 91a

APPENDIX F — DEFENDANT/APPELLANT, DR. JACK KEVORKIAN'S REPLY APPELLATE BRIEF DATED MARCH 3, 2000

STATE OF MICHIGAN

IN THE COURT OF APPEALS

(On Appeal from the Circuit Court for the County of Oakland)

Court of Appeals Docket No. 221758

Lower Court Case No. 98-163675-FC
Hon. Jessica R. Cooper

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff/Appellee,

vs.

JACK KEVORKIAN,

Defendant/Appellant.

* * *

DEFENDANT/APPELLANT, DR. JACK KEVORKIAN'S, REPLY BRIEF ORAL ARGUMENT REQUESTED

Appendix F

[TABLE OF CONTENTS intentionally omitted]

ARGUMENT

I. DR. KEVORKIAN WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED HIM BY THE MICHIGAN AND U.S. CONSTITUTIONS.

The People have taken a shotgun approach in their Brief in a haphazard attempt to defend against Dr. Kevorkian's well-supported allegations. Faced with the realization that the Prosecution failed to respect the Constitutional rights of Dr. Kevorkian, the People have attempted to diminish this failure by disingenuously insisting that Dr. Kevorkian suffered no prejudice because Gorosh's incompetence was merely "trial strategy." However, the relevant inquiry is whether the performance of counsel was below "an objective standard of reasonableness" under prevailing professional norms. *People v. Carrick*, 220 Mich. App. 17, 22; 558 N.W.2d 242 (1996). Dr. Kevorkian has shown that Gorosh's performance was utterly unreasonable, and, as a result, Dr. Kevorkian was deprived of his Constitutional rights.

First, although the People disingenuously attempt to cast Gorosh and Dwyer as "standby counsel," the record (and the People's Brief) make clear that Gorosh and Dwyer acted as attorneys for Dr. Kevorkian before and during the trial. The People admit that "Gorosh appeared at arraignment and obtained bond for defendant, conducted a preliminary examination, filed pretrial motions[,] responded to the People's pretrial motions," "met with defendant repeatedly" and filed

a general appearance. The People concede that Dwyer also served as counsel for Dr. Kervorkian and she even signed certain motions made during trial. To the extent Dwyer contributed to the ineffective assistance provided by the defense team, she too would have been part of the problem[1], however, Dwyer has attested that Gorosh was lead counsel and had complete control over the conduct of the case, and that Gorosh shut her out. R., New Trial Br., Exh. A at ¶¶ 6-11, 18-22.

Although the People contend that Dr. Kevorkian declined all manner of representation by counsel during the trial, the record belies the People's contention. Rather, the record clearly establishes that Dr. Kevorkian sought and received representation from Gorosh during the trial as legal advisor at times and as legal advocate at other times. Tellingly, Dr. Kevorkian specifically stated on the record that he understood his role to be that of a mouthpiece to present information *prepared by his attorneys*. March 23, 1999 Tr., Vol. II at 137; March 23, 1999 Tr., In Chambers Proceedings at 12-13, 25-26. The record further reveals that Gorosh acted as an advocate at times throughout trial as evidenced by the Motion for Introduction of Thomas Youk's Medical Condition filed during trial which was *signed* by Gorosh. In addition, it is undisputed that Gorosh made oral argument to the Trial Court on Dr. Kevorkian's behalf in chambers throughout the trial.

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1. Dwyer states in her Affidavit that she failed in her obligations to Dr. Kevorkian. R., Def.'s Br. In Supp. of Mot. for New Trial ("New Trial Br."), Exhibit A at ¶ 22.

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The People note that the Trial Court asked Dr. Kevorkian if he was certain that he wanted to represent himself. However, at the very times that the Trial Court was asking Dr. Kevorkian if he was certain he wanted to waive his right to counsel, it was *allowing and encouraging* Dr. Kevorkian to consult with and have the aid of counsel in the courtroom and on briefs. March 22, 1999 Tr., Vol. I at 8-10; March 23, 1999 Tr. of In Chambers Proceedings at 25-26; March 25, 1999 Tr., Vol. III at 3. Indeed, the Trial Court repeatedly offered Dr. Kevorkian the opportunity to consult with counsel. People's Br. at 14, 18; March 22, 1999 Tr. Vol. I at 247. The record reveals that Dr. Kevorkian in fact followed the Trial Court's suggestions and consulted with his attorneys throughout the trial. March 22, 1999 Tr., Vol. I at 268; March 23, 1999 Tr., Vol. II at 144-145; March 23, 1999 Tr. of In Chambers Proceedings at 12-14; March 25, 1999 Tr., Vol. III at 3.

The People further assert that Dr. Kevorkian indicated he was satisfied with his counsel. It is important to note that many of the substantial errors made by Gorosh occurred *after* Dr. Kevorkian was questioned as to his satisfaction with counsel. In any event, even at the time that the Trial Court questioned Dr. Kevorkian, he did not want to make it appear as if he was feuding with Gorosh. This was a highly publicized trial, and any dispute between Dr. Kevorkian and his counsel would have been a media event, which would have been detrimental to Dr. Kevorkian's case.

Second, the People contradictorily assert that Dr. Kevorkian did not suffer prejudice by virtue of Gorosh's ineffectiveness because Dr. Kevorkian supposedly has been unable to suggest

any defense that could have been raised, yet concede that attacking the cause of death is a defense. The People dismiss this defense on the grounds that they presented a witness (Dr. Dragovic) who purportedly established the cause of death. However, the testimony of Dr. Dragovic was hardly definitive inasmuch as he admitted that ALS was a "*significant condition contributing to the cause of death*," and admitted that he amended the cause of death on the original coroner's report. March 23, 1999 Tr. Vol. II at 76-77, 91, 106 (emphasis added). Furthermore, the videotape evidences that Thomas Youk gasped before his death. Despite the People's unsupported mischaracterization, this gasp is wholly consistent with *death caused by ALS*, as the Youks would have testified. March 23, 1999 Tr., Vol. II at 75-78, 90-92 (Dr. Dragovic); March 25, 1999 Tr., Vol. III at 63 (Skrzynski). In any event, Dr. Kevorkian was certainly entitled to present his own evidence as to the cause of death, inasmuch as cause of death is a fact question to be determined by the jury.

Dr. Kevorkian has suggested other defenses as well. The People disingenuously assert that "there is no dispute that defendant killed Thomas Youk." On the contrary, this is the very heart of the matter. Murder is a legal conclusion, derived only after the People have proved *each and every element of the crime beyond a reasonable doubt*. Dr. Kevorkian was deprived of presenting significant evidence which could have raised reasonable doubt as to elements of the crime, including cause of death. Holding the Prosecution to its burden is yet another defense.

Also, Dr. Kevorkian has raised a Constitutional challenge to the charges. Gorosh simply refused to advocate this defense, and thus it was presented in pro per at a time when Gorosh undisputably was serving as Dr. Kevorkian's advocate.

Third, the People incorrectly contend that the Trial Court did not grant a *Ginther* hearing because it accepted all Dr. Kevorkian's allegations and supporting affidavits regarding ineffective assistance as true. This is simply not the case. If the Trial Court had in fact taken all the affidavits and allegations in Dr. Kevorkian's Motion for a New Trial as true, the Trial Court could not have denied that Gorosh served as Dr. Kevorkian's trial counsel, as the Trial Court did in its opinion, nor assert that Dr. Kevorkian proceeded in pro per without any lawyers acting as his advisors during the trial itself. Taking Dr. Kevorkian's allegations as true, Gorosh did serve as Dr. Kevorkian's attorney, and his errors amounted to ineffective assistance of counsel. In any event, if the affidavits were insufficient to grant Dr. Kevorkian relief, the Trial Court should have held a *Ginther* hearing inasmuch as the affidavits were only intended to be *illustrative* of Gorosh's ineffective assistance as specifically stated in the accompanying briefs submitted by Dr. Kevorkian to the Trial Court. R., New Trial Br. at 1, 4-5; New Trial Reply Br. at 9.

Fourth, the People assert that because Dr. Kevorkian filed his own motion to dismiss all charges[2], Gorosh's motion to

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2. The People also contend that this motion supports their position that Dr. Kevorkian represented himself. However, the only reason Dr. Kevorkian filed this motion in pro per is because of the (Cont'd)

dismiss the assisted suicide charge can not amount to ineffective assistance. The People, however, neglect to mention that Dr. Kevorkian's in pro per motion was fundamentally different than Gorosh's motion in that it was based only upon a Constitutional argument. If the Court had granted such motion, it would necessarily have had to dismiss both the assisted suicide charge *and* the murder charge.

Finally, the People contend that Gorosh's inappropriate behavior during the trial never occurred because the Trial Court did nothing about it. However, this ignores the sworn affidavits of Holmes and Dwyer attesting that Gorosh engaged in utterly inappropriate behavior throughout the trial that undermined Dr. Kevorkian's defense and violated the Michigan Rules of Professional Conduct. R., Holmes Aff. at ¶¶ 8-9 ; Dwyer Aff. at ¶ 23.

II. DR. KEVORKIAN IS ENTITLED TO A NEW TRIAL BASED UPON THE DOCTRINE OF SERIOUS MISTAKE OF COUNSEL.

Dr. Kevorkian has accurately stated the common law doctrine of serious mistake of counsel which is separate and distinct from, and does not involve, a claim of ineffective assistance of counsel in violation of the Constitution. The People erroneously contend that *People v. Pickens*, 446 Mich. 298; 521 N.W.2d 797 (1994) eliminated the doctrine of serious

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(Cont'd)

breakdown in the attorney client relationship, Gorosh's refusal to file such a motion on behalf of his client, and Gorosh's insistence, against Dr. Kevorkian's wishes, of attempting to quash the assisted suicide charge instead.

mistake of counsel[3]. However, *Pickens* merely stands for the proposition that the standard for ineffective assistance of counsel under the Michigan Constitution is the same as that under the Federal Constitution, and in no way eliminated the separate and distinct serious mistake of counsel doctrine which only focuses on the fairness of the trial in light of serious mistake of counsel. *Id.* at 311-314.

III. THE PROSECUTOR MADE NUMEROUS PREJUDICIAL COMMENTS.

The People assert that the Prosecutor's comments, though generally in violation of Dr. Kevorkian's Fifth Amendment rights, were somehow acceptable because Dr. Kevorkian purportedly attempted to testify in his closing argument yet did not take the stand during trial. The cases relied upon by the People to support this proposition are inapposite. Indeed, in *United States v. Warner*, 428 F.2d 730 (8th Cir. 1970), relied upon by the People, the Eighth Circuit cautioned that Constitutional rights are paramount, and the prosecutor must be "particularly careful not to violate such constitutional rights in the case of a pro se defendant." *Id.* at 739. The Court further suggested that a prosecutor may indicate that a pro se defendant's comments are not evidence without mentioning the defendant's failure to take the stand. *Id.* Here, the Prosecutor directly commented on Dr. Kevorkian's exercise of his Fifth Amendment right not to testify, and did not restrict his objections to simply indicating that Dr. Kevorkian's comments were not evidence.

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3. Although Dr. Kervokian raised the serious mistake of counsel doctrine in his Motion For a New Trial, the People did not contend that such doctrine was no longer viable.

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In any event, Dr. Kevorkian, unlike the People, has cited Michigan cases which expressly hold that Michigan is committed to vigorously upholding a defendant's Fifth Amendment right, and forbidding the prosecution from commenting, even indirectly, on the defendant's decision not to take the stand. *See, e.g., People v. Joseph*, 384 Mich. 24; 179 N.W.2d 383 (1970); *People v. Bell*, 32 Mich. App. 375; 188 N.W.2d 909 (1971).

The People also contend that because the Prosecutor's comments upon Dr. Kevorkian's absolute Fifth Amendment right not to testify came in the form of objections, they are somehow subject to less scrutiny. The People provide no support for this notion. Even if Dr. Kevorkian mistakenly interjected testimony into his closing argument, the Prosecutor is held to a higher standard of behavior than defendant inasmuch as the Prosecutor is a trained and experienced attorney. Furthermore, at least one comment did not come in the form of an objection[4].

The People disingenuously claim that the Trial Court stopped the Prosecutor from making any impermissible comments. This is simply not so, as the record clearly reflects. On at least *four occasions*, in quick succession, the Prosecutor directly commented upon Dr. Kevorkian's Fifth Amendment

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4. The Prosecutor pointed out during his closing that Dr. Kevorkian "turns the videotape off and he goes back to work apparently. We don't know exactly what he does. And why does he turn it off? Why doesn't he keep the whole thing on all the time." March 25, 1999 Tr., Vol. III at 32 (Skrzynski). This comment certainly asked the jury to draw a negative inference from Dr. Kevorkian's decision not to testify.

Right not to testify. In fact, on the one occasion that the People contend that the Trial Court somehow prevented an impermissible comment, the Prosecutor said *the defendant "could have gotten on — you know, he didn't.*" March 25, 1999 Tr., Vol. III at 54 (emphasis supplied). Although the Prosecutor did not use the words "the stand," everyone in the courtroom, especially the jury, was able to fill in the blank.

The People further attempt to justify the Prosecutor's impermissible comments about possible penalties by incorrectly stating that the comment was not meant to refer to Dr. Kevorkian's punishment if convicted[5]. The reason for the Prosecution's impermissible remark as to penalty is irrelevant, and in any event the Prosecution did not provide its contrived explanation to the jury. The Prosecutor simply may not make reference to penalty in front of the jury.

In addition, the People disingenuously contend that Dr. Kevorkian was not prejudiced by the prosecutor's comments regarding the issue of consent because the Trial Court instructed the jury that consent was not a defense. However, the very reason Dr. Kevorkian was prejudiced is because the prosecution was permitted to argue the lack of consent while Dr. Kevorkian was precluded from presenting any evidence regarding the issue of consent.

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5. The People first disingenuously assert that they can find no reference to penalty, but later acknowledge that the Prosecutor referenced the death penalty in his closing argument. People's Br. at 15, 45

The Prosecutor also made comments strictly to inflame the jury, such as mentioning the killing of Down's Syndrome child, and a teenage girl contemplating suicide because of trouble with her boyfriend. March 25, 1999 Tr., Vol. III at 65-66 (Skrzynski). The People assert that the Down's Syndrome comment somehow should be forgiven because it was brief, but they have no "excuse" for the mention of a teenager contemplating suicide. Such comments, which were solely without support and irrelevant to the facts of this case, had only one purpose, which was to inflame the jury, such that passion instead of reason would rule their deliberations.

IV. DR. KEVORKIAN'S CONSTITUTIONAL CHALLENGE HAS NOT BEEN DECIDED.

Although the Michigan and U.S. Supreme Courts have rejected certain Constitutional challenges to *assisted suicide statutes*, Dr. Kevorkian's instant challenge is *not* to an assisted suicide statute, inasmuch as he was neither tried nor convicted under such statute.

The People wholly misinterpret Dr. Kevorkian's Constitutional argument. If this Court finds that the Ninth Amendment does reserve *to the individual* the right to receive medical treatment to alleviate unbearable pain, then such right, like all other *fundamental rights* guaranteed by the Bill of Rights, would logically be made applicable to the states through the Fourteenth Amendment, pursuant to the well-settled doctrine of "selective incorporation."

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The People assert that because Dr. Kevorkian did not provide direct case law to support his view that Art. 1, § 23 of the Michigan Constitution protects such a right, such a right must not exist. This is sophistry inasmuch as Art. 1, § 23 of the Michigan Constitution, like the Ninth Amendment, protects *unenumerated* rights. Only when such a right is asserted can the courts directly determine whether such a right is protected. Indeed, the very purpose of Art. 1, § 23 and the Ninth Amendment is to reserve rights to the people *without specifically listing them.*

The People nonetheless claim that the Michigan Supreme Court has already ruled upon Dr. Kevorkian's Constitutional claims in *People v. Kevorkian*, 447 Mich. 436; 527 N.W.2d 714 (1994). This is simply not so. The Michigan Supreme Court merely found that there is no Constitutional right to commit suicide. *Id.* at 481-482. The Court in no way addressed the issue of a Constitutional right to be free from unbearable pain and suffering.

Furthermore, the People mischaracterize Dr. Kevorkian's reliance on *Glucksberg*. In fact, the instant claim is different than that brought in *Glucksberg* because Thomas Youks' pain *could not be alleviated through palliative care.*[6] The Youks would have testified to this, and furthermore, Thomas Youk stated on tape that he desired to end his "intolerable and hopelessly incurable suffering." March 23, 1999 Tr. Vol. II

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6. The People assert that Thomas Youk was receiving hospice care and had been prescribed numerous medications. This in no way indicates that the palliative care Thomas Youk was receiving was *adequate.*

at 16. This fully contradicts the Prosecution's unsupported assertion that the only purpose for the injection was to kill Thomas Youk. Therefore, Thomas Youk's liberty interest is different than that of the respondents in *Glucksberg*, whose pain could be alleviated through palliative care. The case at bar, then, is precisely of the type which the Supreme Court indicated might be worthy of review to determine a Constitutional right to be free from unbearable and untreatable pain and suffering.

V. THE TESTIMONY OF THE YOUKS SHOULD HAVE BEEN ADMITTED.

The People acknowledge that they have a duty to indorse all *res gestae* witnesses, but contend they do not have an obligation to produce *res gestae* witnesses. The People, however, concede that Melody and Terry Youk were *res gestae* witnesses[7]. Thus, the substantive basis for permitting the testimony of *res gestae* witnesses as fully set forth in Dr. Kevorkian's Appellate Brief clearly applies to them. Dr. Kevorkian was fully entitled to call such witnesses and have any doubts as to the relevance of their proposed testimony resolved in his favor. *People v. Austin*, 95 Mich. App. 662, 674; 291 N.W.2d 160 (1980). Indeed, even cases decided after 1986 emphasize the importance of the testimony of *res gestae* witnesses to

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7. Dr. Kervorkian does not, and never has, contended that Melody Youk was present when the videotape was made. Nevertheless, the *res gestae* witness rule encompasses *not only eyewitnesses, but all witnesses whose testimony may aid in the making of a fair presentation of the res gestae of the crime charged. People v. Baskin*, 145 Mich. App. 526, 530-531, 535; 378 N.W.2d 535 (1985) (per curiam).

shed light on the entire facts and circumstances of the alleged crime. *See, e.g., People v. Johnson*, 164 Mich. App. 634, 644 at n. 3; 418 N.W.2d 117 (1987).

The People further state, without support, that the Youks should not be allowed to testify under any exception to the hearsay rule. However, Melody Youk specifically testified that she, Thomas Youk and Dr. Kevorkian freely discussed how to best treat Thomas Youk. March 23, 1999 Tr. Vol. II at 122. Furthermore, Melody Youk stated that Thomas Youk discussed "his situation" with Dr. Kevorkian. Clearly, this refers to Thomas Youk's then-existing physical and mental condition. *Id.* Testimony as to this discussion relates to both Thomas Youk's cause of death, as well as the type of treatment provided by Dr. Kevorkian to Thomas Youk. Such discussion is admissible pursuant to MRE 803(3).

The Youks' testimony is also permitted under MRE 803(4). Although the People erroneously contend that MRE 803(4) does not apply because Dr. Kevorkian is not licensed to practice medicine, there is simply no such limitation in the rule. The focus of the rule is whether the *declarant sought* medical treatment, not whether such treatment could in fact be provided. West's Michigan Court Rules Practice notes that "statements to hospital attendants, ambulance drivers, or even members of the family" are admissible under this exception.

Thomas Youk's statements could also have been admitted pursuant to MRE 804(b)(2) as a statement under belief of impending death inasmuch as Thomas Youk knew his death was imminent because he was in the *end stages of ALS*. Melody and Terry Youk would have confirmed this. Inasmuch

as the Prosecution contends that Dr. Kevorkian caused Thomas Youk's death in the course of relieving Thomas Youk's pain and suffering, any discussion between Thomas Youk and Dr. Kevorkian as to Dr. Kevorkian's treatment of Youk certainly relate to the cause and circumstances of Thomas Youk's death.

CONCLUSION AND RELIEF SOUGHT

Dr. Kevorkian respectfully requests this Court to issue the relief requested in his Appellate Brief.

Respectfully submitted,
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APPENDIX G — DEFENDANT/APPELLANT, DR. JACK KEVORKIAN'S APPELLATE BRIEF DATED NOVEMBER 12, 1999

STATE OF MICHIGAN

IN THE COURT OF APPEALS

(On Appeal from the Circuit Court for the County of Oakland)

Court of Appeals Docket No. 221758

Lower Court Case No. 98-163675-FC
Hon. Jessica R. Cooper

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff/Appellee,

vs.

JACK KEVORKIAN,

Defendant/Appellant.

* * *

DEFENDANT/APPELLANT, DR. JACK KEVORKIAN'S, APPELLATE BRIEF ORAL ARGUMENT REQUESTED

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[TABLE OF CONTENTS intentionally omitted]

STATEMENT OF JURISDICTION

Defendant/Appellant, Dr. Jack Kevorkian ("Dr. Kevorkian") filed this appeal as a matter of right pursuant to MCR 7.204(A)(2)(d). A verdict convicting Dr. Kevorkian of murder in the second degree and delivery of a controlled substance was returned by the jury on March 26, 1999. Dr. Kevorkian was sentenced on April 13, 1999, and Judgment and Sentence was entered by the Trial Court on that date. Dr. Kevorkian timely filed a Motion for a New Trial on May 21, 1999 pursuant to MCR 6.431(A)(1). Dr. Kevorkian's Motion for a New Trial was denied by the Trial Court without oral argument on July 15, 1999. Dr. Kevorkian filed his claim of appeal on August 23, 1999, which was within 42 days after entry of the order denying his Motion for a New Trial, as permitted by MCR 7.204(A)(2)(d).

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STATEMENT OF QUESTIONS PRESENTED

I. WHETHER THE TRIAL COURT ERRONEOUSLY DENIED DEFENDANT/APPELLANT, DR. KEVORKIAN'S, MOTION FOR A NEW TRIAL FILED PURSUANT TO MCR 6.431 WHERE DEFENDANT/APPELLANT, DR. KEVORKIAN, DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 20 OF THE MICHIGAN CONSTITUTION.

Defendant/Appellant, Dr. Kevorkian, answers, "Yes."

Plaintiff/Appellee, People of the State of Michigan (the "People"), answer, "No."

The Trial Court answered, "No."

II. WHETHER THE TRIAL COURT ERRONEOUSLY DENIED DEFENDANT/APPELLANT, DR. KEVORKIAN'S, MOTION FOR A NEW TRIAL PURSUANT TO MCR 6.431 PREMISED UPON THE FACT THAT DEFENDANT/APPELLANT, DR. KEVORKIAN'S, TRIAL COUNSEL MADE SERIOUS MISTAKES WHICH DENIED DEFENDANT/APPELLANT, DR. KEVORKIAN, HIS RIGHT TO A FAIR TRIAL UNDER THE MICHIGAN COMMON LAW.

Defendant/Appellant, Dr. Kevorkian, answers, "Yes."

Plaintiff/Appellee, the People, answer, "No."

The Trial Court answered, "No."

III. WHETHER THE TRIAL COURT ERRONEOUSLY DENIED DEFENDANT/APPELLANT, DR. KEVORKIAN'S, MOTION FOR A MISTRIAL WHERE IMPERMISSIBLE COMMENTS WERE MADE BY THE PROSECUTOR ABOUT DEFENDANT/APPELLANT, DR. KEVORKIAN'S, DECISION TO AVAIL HIMSELF OF HIS ABSOLUTE FIFTH AMENDMENT RIGHT NOT TO TESTIFY.

Defendant/Appellant, Dr. Kevorkian, answers, "Yes."

Plaintiff/Appellee, the People, answer, "No."

The Trial Court answered, "No."

IV. WHETHER THE TRIAL COURT ERRONEOUSLY DENIED DEFENDANT/APPELLANT, DR. KEVORKIAN'S, MOTION TO DISMISS WHERE DEFENDANT/APPELLANT, DR. KEVORKIAN, WAS COMPELLED TO STAND TRIAL AND WAS CONVICTED IN VIOLATION OF THE NINTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTIONS 17 AND 23 OF THE MICHIGAN CONSTITUTION.

Defendant/Appellant, Dr. Kevorkian, answers, "Yes."

Plaintiff/Appellee, the People, answer, "No."

The Trial Court answered, "No."

V. WHETHER THE TRIAL COURT ERRONEOUSLY REFUSED TO ALLOW THE TESTIMONY OF *RES GESTAE* WITNESSES, TERRY AND MELODY YOUK.

Defendant/Appellant, Dr. Kevorkian, answers, "Yes."

Plaintiff/Appellee, the People, answer, "No."

The Trial Court answered, "No."

VI. WHETHER REVERSAL IS REQUIRED BY VIRTUE OF NUMEROUS OTHER CLEAR ERRORS WHICH PREJUDICED DR. KEVORKIAN AND DEPRIVED HIM OF A FAIR TRIAL.

Defendant/Appellant, Dr. Kevorkian, answers, "Yes."

Plaintiff/Appellee, the People, answer, "No."

The Trial Court answered, "No."

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STATEMENT OF FACTS

Dr. Kevorkian retained David Gorosh ("Gorosh") as his lead defense trial counsel in connection with the instant action. R., Def.'s Br. In Supp. of Mot. for a New Trial ("New Trial Br."), Exh. A (Aff. of Lisa Dwyer, Esq., hereinafter referred to as "Exh. A") at 1. Lisa Dwyer, Esq. ("Dwyer"), a member of the State Bar of Michigan since 1993, was asked by Gorosh to serve as co-counsel. *Id.* at 1. Gorosh had only three years experience, and his trial experience was extremely limited. R., New Trial Br., Exh. B (Aff. of Michael Schwartz, Esq., hereinafter referred to as "Exh. B") at 1-2, 4-5. He had never defended a felony, much less a murder case. *Id.* at 1. Gorosh's former employer and supervisor, Michael Schwartz, Esq. ("Schwartz"), states, based on his previous experience working with Gorosh, that when faced with a situation where Gorosh was required to subordinate his own interests to that of his client, Gorosh was either unwilling or unable to do so. *Id.* at 3, 5. Gorosh was ill-equipped to serve as lead counsel in a murder case, given his lack of experience, his inability to grasp important strategic considerations, and his inability to consider the best interests of the client as noted in affidavits submitted by Gorosh's colleagues and co-counsel. R., New Trial Br., Exh. B at 2-5, Exh. A at 2.

On December 9, 1998, Dr. Kevorkian was bound over on the three counts charged in the information: Count I — first degree murder, Count II — delivery of a controlled substance, and Count III — assisting suicide. December 9, 1999 Tr. at 119-124, 142; R., First Amended General Information.

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The charges were brought based upon a videotape that was aired on 60 Minutes, which subsequently was admitted as an exhibit at trial. March 23, 1999 Tr., Vol. II at 8-9. The videotape revealed that: (1) Thomas Youk suffered from ALS, a degenerative disease that caused him unbearable pain and suffering; (2) Thomas Youk had no control of his muscles and was terrified of choking; (3) Thomas Youk was close to death when he sought the aid of Dr. Kevorkian to alleviate his pain and suffering; and (4) in order to relieve Thomas Youk's pain and suffering, Dr. Kevorkian administered an injection to Thomas Youk, even though such injection could possibly hasten the time of death. *Id.* The Prosecution alleged that this act constituted murder, possession of a controlled substance, and criminal assistance to suicide.

During the initial stages of the co-representation, Dwyer felt she would have input regarding defense strategies. R., New Trial Br., Exh. A at 1. However, by the time of Dr. Kevorkian's preliminary hearing on December 16, 1998, Dwyer realized her recommendations would have no effect on Gorosh's decisions. *Id.*

The relationship between Dwyer and Gorosh deteriorated rapidly, and by January 1999, Dwyer discussed the possibility of withdrawing as co-counsel. *Id.* at 3. Gorosh persuaded Dwyer to stay on because he felt Dwyer had developed a good working relationship with Dr. Kevorkian. *Id.* at 1. Nevertheless, Gorosh's control over all aspects of the case became unyielding. *Id.* at 1-2. Gorosh withheld vital information from Dwyer. *Id.* Gorosh made public comments without consulting Dwyer, and comments to the media against the express wishes of Dr. Kevorkian. *Id.*; R. Def.'s Reply Brief

in Further Supp. of Mot. for a New Trial ("New Trial Reply Br."), Exh. A (Aff. of Kevorkian, hereinafter referred to as "Exh. A") at 1. Besides ignoring the advice and input of co-counsel, Gorosh also ignored the input and wishes of his client, Dr. Kevorkian. *Id.*

Gorosh obstinately insisted on proceeding with a pre-trial motion to quash the assisted suicide count, with the full knowledge that this could prevent his client from calling favorable witnesses at trial. R., New Trial Br., Exh. A at 1-2. Gorosh proceeded with this motion against the advice of co-counsel, Dwyer, as well as several experienced attorneys, and the express wishes of his client, Dr. Kevorkian. R., New Trial Br., Exh. A at 1-2, Exh. B at 3-4; R., New Trial Reply Br., Exh A at 1. Schwartz, an experienced criminal attorney and Gorosh's former employer, strongly advised Gorosh just before the preliminary hearing not to seek dismissal of the assisted suicide charge because Schwartz considered charging both murder and assisting suicide to be a mistake on the part of the Prosecutor. R., New Trial Br., Exh. B at 1-4.

Subsequent to the bindover by the magistrate, Schwartz again strongly urged Gorosh not to seek dismissal of the assisted suicide charge, and explained to Gorosh how maintaining both charges could be advantageous to Dr. Kevorkian. *Id.* at 4. Gorosh nevertheless insisted that it was important to have whatever charges he could dismissed as soon as possible, even if that meant giving up beneficial arguments that could later be made on behalf of Dr. Kevorkian. *Id.* Schwartz's partner, attorney Geoffrey Fieger, Esq. ("Fieger") similarly strongly recommended to Gorosh that he not seek the dismissal of the assisted suicide charge. *Id.*

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In addition to seeking to dismiss the assisted suicide charge, Gorosh discounted a motion to quash the murder charge written by Dwyer. R., New Trial Br., Exh. A at 2. Gorosh deleted a common law challenge to the murder count that Dwyer sought to include in the motion to quash because he failed to grasp the legal argument. *Id.* Dwyer and Gorosh heatedly argued about the presentation of these motions. *Id.* Gorosh insisted that no one knew the case better than him. *Id.* Dwyer indicated that when defending a murder case, all efforts should be made toward attacking the murder count, and that the motion attacking the murder count was meritorious. *Id.* Dwyer also recommended that there was a way to argue both the motion attacking the murder charge and the motion to drop the assisting suicide charge jointly. *Id.* Gorosh rejected Dwyer's input, and neglected to zealously argue the dismissal of the murder count at the motion hearing. *Id.*

Despite the admonitions of Dwyer, Schwartz and Fieger, Gorosh did seek to dismiss the assisted suicide motion. R., New Trial Br., Exh. A at 2, Exh. B at 3-4. At the motion hearing held on March 3, 1999, even Judge Cooper was baffled by Gorosh's decision. March 3, 1999 Motion Hearing Tr. at 12 (The Court). The Court asked Gorosh four times if he was certain this was how he wanted to proceed. *Id.* at 12-13. The Court stated on the record, "Let me see if I've got this straight. You want this Court to dismiss the four-year felony and let him go to trial on murder in the first degree?" *Id.* at 12 (The Court). The Court then questioned Gorosh about the efficacy of this strategy, asking "What if they decide not to participate on assisted suicide at all and they just go for murder." *Id.* at 13. Gorosh replies, "What do you mean?" *Id.* (Gorosh). The Court continues, "What if they decide . . .

that they're going to nolle pros the assisted suicide?" *Id.* (The Court). The Court further questions Gorosh, "And you want them to go forward on murder in the first degree without having assisted suicide as one of those charges?" *Id.* Despite the clear suggestions by the Court, Gorosh pressed ahead with his argument to quash the assisted suicide count. *Id.* at 13-14 (Gorosh). On March 12, 1999, the Prosecution did nolle prosequi the assisted suicide charge, and proceeded only on the murder and delivery of a controlled substance charges. March 12, 1999 Tr., Dismissal of Count III at 3 (Skrzynski).

As the trial approached, Dr. Kevorkian wished to proceed with a hybrid defense. R., New Trial Br., Exh. A at 2. Dr. Kevorkian wanted to have Gorosh and Dwyer serve as advocates regarding certain matters, and as advisors regarding others. *Id.* Despite this understanding, Gorosh never discussed with Dr. Kevorkian the precise duties each party would have at trial. *Id.* At a March 19, 1999 hearing in chambers, Judge Cooper indicated that she would not permit a hybrid defense. *Id.*; March 19, 1999 Tr. at 12-14 (The Court). Dr. Kevorkian could either represent himself at trial, or be represented by counsel, but not both. *Id.* At this point, Dr. Kevorkian agreed to allow Gorosh and Dwyer to conduct the trial. R., New Trial Br., Exh. A at 2, Exh. C (Aff. of Ruth Holmes, hereinafter referred to as "Exh. C") at 2-3.

Gorosh then decided he would essentially conduct all aspects of the trial, including jury voir dire, opening and closing statements, and the examination of all witnesses, except Dr. Dragovic. R., New Trial Br., Exh. A at 2.

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On the weekend immediately preceding the trial, Gorosh did little to prepare. *Id.* at 2-3. On Saturday, March 20th, Gorosh did not make any substantive preparations for trial. *Id.* Gorosh spent most of the day arguing with a young attorney who barely had a working relationship with Dr. Kevorkian. *Id.* Dr. Kevorkian explicitly indicated that he did not want the young attorney involved with the trial. *Id.*; R., New Trial Reply Br., Exh. A at 1. On Sunday, March 21st, Gorosh and Dwyer were to meet with Dr. Kevorkian. R., New Trial Br., Exh. A at 3. Dwyer met with Dr. Kevorkian at 10:00 a.m., and discussed the division of trial duties. *Id.* At about 10:30 a.m., Gorosh and the other young attorney arrived. *Id.* at 3. Dr. Kevorkian immediately became distressed that this other young attorney was present, because he had explicitly instructed Gorosh not to bring him. *Id.*; R., Exh. C at 2; R., New Trial Reply Br., Exh. A at 1. An hour-long argument ensued wherein Dr. Kevorkian informed Gorosh that he no longer trusted him. R., New Trial Br., Exh. A at 3, Exh. C at 2-3; R., New Trial Reply Br., Exh. A at 1.

Dr. Kevorkian told Gorosh in no uncertain terms that he would represent himself unless Dwyer could represent him at trial. R., New Trial Br., Exh. A at 3, Exh. C at 2-3. Gorosh was adamant that Dwyer could not represent Dr. Kevorkian. R., New Trial Br., Exh. A at 3. Dwyer discussed this matter with Gorosh, and Gorosh reiterated that she could not conduct the trial because he was lead counsel, and it would damage his reputation if Dwyer replaced him. *Id.* For the same reason, Gorosh refused Dwyer's suggestion that she conduct the substantive aspects of the trial in the beginning, with the hope that the relationship between Gorosh and Dr. Kevorkian would improve once trial commenced. *Id.*

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Because Gorosh stated that he would not permit Dwyer to act as trial counsel, Dwyer expressed reservations when Dr. Kevorkian again asked her to represent him at trial. *Id.* Dwyer indicated she was concerned about conducting the trial alone because terminating Gorosh would cause a great deal of publicity. *Id.* In addition, Dwyer indicated she felt awkward because Gorosh had asked her to assist as co-counsel. *Id.* Despite knowing that representing himself could be detrimental to his case, Dr. Kevorkian decided he would rather represent himself than be represented by Gorosh. *Id.* Had Gorosh permitted Dwyer to act as lead counsel, as Dr. Kevorkian desired, Dr. Kevorkian would not have personally presented the case to the jury. *Id.*

Dwyer discussed the breakdown of the attorney-client relationship with Gorosh on the way to Court on March 22, 1999, the day of trial. *Id.* Dwyer suggested that Gorosh discuss the situation with Judge Cooper, but Gorosh refused. *Id.* Prior to the start of trial, Judge Cooper called counsel into chambers to discuss preliminary matters. *Id.* at 2-3. Gorosh indicated to Judge Cooper that Dr. Kevorkian would be representing himself, with Dwyer and Gorosh acting as advisors. *Id.* As a result of this change, Judge Cooper questioned Gorosh. *Id.* Gorosh never informed Judge Cooper of Dr. Kevorkian's desire to have Dwyer act as lead trial counsel. *Id.* Gorosh deliberately undermined Dr. Kevorkian by suggesting Dr. Kevorkian was incompetent, and that Dr. Kevorkian might disrupt the proceedings. *Id.* Dwyer did not believe that Gorosh was acting in Dr. Kevorkian's best interest, and left the conference after stating that there had been a breakdown in the attorney-client relationship. *Id.*

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Gorosh had represented Dr. Kevorkian as an advocate until the time of trial. December 16, 1998 Tr., Arraignment at 3-5; December 22, 1998 Tr., In Chambers Proceedings at 3; February 1, 1999 Tr., Motion at 3; February 16, 1999 Tr., In Chambers Proceedings at 3; March 3, 1999 Tr., Motion at 3; March 12, 1999 Tr., Dismissal of Count III at 3; March 16, 1999 Tr., Motion at 3-4; March 19, 1999 Tr., Hearing at 3. Although the Trial Court purportedly denied any form of hybrid representation, the Trial Court insisted that Gorosh stay on to provide advice and consultation to Dr. Kevorkian, and Dr. Kevorkian agreed to this arrangement. March 22, 1999 Tr., Vol. I at 10-12; March 23, 1999 Tr., Vol. II at 95-96, 101, 135, 137, 145 (The Court); March 23, 1999 Tr., In Chambers Proceedings at 13, 25-26 (The Court). In fact, Gorosh even acted as an advocate at times as well as an advisor for Dr. Kevorkian during trial. R., New Trial Br., Exh. A at 2; March 23, 1999 Tr., Vol II at 95-96, 98 (The Court). During the trial, Gorosh continued to argue motions to the Trial Court, prepare trial memoranda, speak on behalf of Dr. Kevorkian during in-chambers proceedings, and advise Dr. Kevorkian pursuant to the Trial Court's directions. March 22, 1999 Tr., Vol. I at 237, 247, 268; March 23, 1999 Tr., In Chambers Proceedings at 3; March 25, 1999 Tr., Vol. III at 3; March 23, 1999 Tr., Vol. II at 95, 98, 101, 132, 145; March 26, 1999 AM Tr., In Chambers Proceedings.

Throughout the trial, Gorosh and Dwyer sat at the counsel table with Dr. Kevorkian. R., New Trial Br., Exh. A at 4; March 22, 1999 Tr., Vol. I at 10-11, 247. Dr. Kevorkian was under the impression that he was represented by counsel throughout the trial. March 22, 1999 Tr., Vol. I at 268. Dr. Kevorkian understood his role to be that of a mouthpiece

to present information prepared by his attorneys. March 23, 1999 Tr., Vol. II at 137; March 23, 1999 Tr., In Chambers Proceedings at 12-13, 25-26.

However, after it became clear to Gorosh that he would not be conducting the trial, he became distant and at times withheld legal advice from Dr. Kevorkian, in an attempt to frustrate Dr. Kevorkian so that he would turn over all aspects of the case to Gorosh. R., New Trial Br., Exh. C at 3-4. As the trial progressed, Gorosh became far more interested in making comments to the media than in defending his client. R., New Trial Br., Exh. A at 1-4, Exh. C at 4; R., New Trial Reply Br., Exh. A at 1. Gorosh's priorities became confused, detrimentally affecting Dr. Kevorkian's defense and best interests. R., New Trial Br., Exh. C at 4; R., New Trial Reply Br., Exh. A at 1.

During the trial, Gorosh displayed contempt and ridicule for Dr. Kevorkian, and the defense Dr. Kevorkian was attempting to present. R., New Trial Br., Exh. A at 4, Exh. C at 3-4. Throughout the trial, Gorosh made comments under his breath, rolled his eyes, sighed deeply, put his head in his hands, smirked, and appeared to share the Trial Court's discomfort during difficult points, rather than assisting his client, Dr. Kevorkian. R., New Trial Br., Exh. A at 4. Gorosh sat between Dwyer and Dr. Kevorkian, making it impossible for Dwyer to consult with Dr. Kevorkian during trial even though Dr. Kevorkian so desired. *Id.*; R., New Trial Reply Br., Exh. A at 1. Ruth Holmes, DCE ("Holmes"), a jury consultant and handwriting and document examiner versed in evaluating body language, was retained by Dr. Kevorkian as a jury consultant to aid in his defense. R., New Trial Br.,

Exh. C at 1. Holmes advised Gorosh that his behavior would have a negative effect on the presentation of Dr. Kevorkian's defense. *Id.* at 4.

During the times that Gorosh acted as an advocate as well as the times he acted as an advisor, Gorosh provided very little substantive advice or consultation to Dr. Kevorkian with respect to trial preparation, and virtually no advice during the actual trial proceedings themselves. *Id.*; R., New Trial Reply Br., Exh. A at 1. Gorosh did not respond to Dr. Kevorkian's requests for information, despite Dr. Kevorkian's repeated inquiries. R., New Trial Reply Br., Exh. A at 1. Gorosh never showed Dr. Kevorkian a complete witness list. *Id.* Gorosh never coached Dr. Kevorkian about the questioning of witnesses nor the proper procedures for making objections. *Id.* Gorosh rarely returned Dr. Kevorkian's telephone calls regarding the case, and never did so in a timely manner. *Id.* As the trial progressed, Dr. Kevorkian developed further distrust of Gorosh, and began to feel that Gorosh was incapable of providing adequate counsel. *Id.* Dr. Kevorkian became shocked at Gorosh's unscrupulous and insolent behavior. *Id.*

Dr. Kevorkian requested Gorosh's assistance in preparing legal arguments and an offer of proof in support of calling Melody and Terry Youk, the wife and brother of Thomas Youk, as witnesses for the defense. R., New Trial Br., Exh. A at 4. Gorosh did not prepare any research, nor the offer of proof as Dr. Kevorkian had specifically requested. *Id.*; R., Exh. C at 3-4. As a result of Gorosh's inaction, Dwyer was left to hastily prepare an offer of proof and legal argument for Dr. Kevorkian during a lunch recess. *Id.* Even when the

Trial Court provided the opportunity and time for the defense to present a written memorandum in support of its position, Dwyer was left to hurriedly put something together to attempt to protect Dr. Kevorkian and preserve the record because Gorosh did nothing. *Id.*; March 23, 1999 Tr., Vol. II at 145 (The Court). Judge Cooper commented on the quality of the memorandum submitted, stating, "I can only assume the attorneys who aided and assisted, or if they aided and assisted, are constrained under the theory of the case." March 25, 1999 Tr., Vol. III at 3 (The Court).

Although numerous avenues were available to support the admission of the testimony of the Youks, Gorosh pursued none of these, and did not properly advise Dr. Kevorkian about how to present legal support for the admission of such testimony. R., New Trial Br., Exh. A at 4, Exh. C at 4. Furthermore, despite the progressive and ultimately fatal nature of Thomas Youk's disease, Gorosh did not challenge the cause of death, a rudimentary legal tactic in a murder trial, particularly one that is appropriate where the decedent suffered from a fatal and incurable medical condition. March 23, 1999 Tr., Vol. II at 75-78, 90-91 (Dr. Dragovic). There was evidence to support raising a question as to the cause of death of Thomas Youk due to the advanced stage of his ALS, and this was one of the grounds by which Melody and Terry Youk could have been called as witnesses. *Id.* Indeed, Thomas Youk gasped *prior* to any actions by Dr. Kevorkian, and this sound may very well have been associated with death due to ALS. March 25, 1999 Tr., Vol. III at 63 (Skrzynski). Because no adequate legal arguments were presented, the Trial Court denied the admission of the testimony of Melody and Terry Youk,

and Dr. Kevorkian was left without any defense. R., New Trial Br., Exh. A at 4, Exh. C at 4; March 25, 1999 Tr., Vol. III at 5-6 (The Court).

Dwyer requested that Gorosh instruct Dr. Kevorkian to object to numerous inappropriate references made by the Prosecutor during his closing and rebuttal arguments. R., New Trial Br., Exh. A at 4-5. Nevertheless, Gorosh only advised Dr. Kevorkian to object on one occasion. *Id.*; March 25, 1999 Tr., Vol. III at 65 (Dr. Kevorkian).

In his closing, the Prosecutor discussed Dr. Kevorkian's motives for preparing the videotape, although Dr. Kevorkian was not permitted to introduce the testimony of Melody and Terry Youk which would likewise bear on his motives for preparing the videotape. March 25, 1999 Tr. Vol. III at 25, 29-31, 34-35, 41-42 (Skrzynski), 5-6 (The Court). The Prosecutor asserted that Dr. Kevorkian picked Thomas Youk, when in fact Melody and Terry Youk could have testified that it was Thomas Youk who picked Dr. Kevorkian. *Id.* at 25 (Skrzynski), 5-6 (The Court). The Prosecutor went on to claim that Dr. Kevorkian learned only minimal information about Thomas Youk. *Id.* at 26 (Skrzynski). Dr. Kevorkian was prohibited from introducing the testimony of Melody and Terry Youk in order to show what else he knew about Thomas Youk's medical condition and Thomas Youk personally. March 23, 1999 Tr., Vol. II at 112-115 (Dr. Kevorkian), 121-122 (Melody Youk); March 25, 1999 Tr., Vol. III at 5-6 (The Court). The Prosecutor discussed Dr. Kevorkian's intent, although Dr. Kevorkian was not permitted to introduce any evidence of his intent. March 25, 1999 Tr., Vol. III at 28, 31 (Skrzynski), 5-6 (The Court);

March 23, 1999 Tr., Vol. II at 100 (Dr. Kevorkian), 121-125 (Melody Youk). The Prosecutor stated, "You can infer a person's intent from . . . the circumstances surrounding what they do." March 25, 1999 Tr., Vol. III at 28 (Skrzynski). Dr. Kevorkian was precluded from presenting the testimony of Terry and Melody Youk as to the facts and circumstances surrounding his interaction with Thomas Youk. March 23, 1999 Tr., Vol. II at 121-125 (Melody Youk); March 25, 1999 Tr., Vol. III at 5-6 (The Court). The Prosecutor stated that Dr. Kevorkian had a large piece of medical equipment with him. March 25, 1999 Tr., Vol. III at 31-32 (Skrzynski). Melody and Terry Youk were precluded from testifying as to what Dr. Kevorkian brought with him that night. *Id.* at 5-6 (The Court). The Prosecutor also denied that Thomas Youk was afraid of choking to death. *Id.* at 37-38. Melody and Terry Youk could have testified to Thomas Youk's medical condition and the fear this caused him, but they were not permitted to do so. *Id.* at 5-6 (The Court). The Prosecutor presented several inflammatory, prejudicial and extreme examples of euthanasia for which no evidence was presented. *Id.* at 65-66 (Skrzynski). Gorosh did not object to any of these comments, and prompted Dr. Kevorkian to object only once. *Id.* at 25-46, 61-66 (Skrzynski), 65 (Dr. Kevorkian).

The Prosecution made several references directly bearing upon Dr. Kevorkian's decision to invoke his absolute Constitutional right not to testify on his own behalf during objections to Dr. Kevorkian's closing argument. March 25, 1999 Tr., Vol. III at 32-33, 50-54 (Skrzynski). Initially, the Prosecutor impliedly commented on Dr. Kevorkian's decision not to testify, saying, "He [Dr. Kevorkian] turns the videotape off and he goes back to work, apparently. We don't

know exactly what he does. And why does he turn it off? Why doesn't he keep the whole thing on all the time?" *Id.* at 32-33 (Skrzynski). The Prosecutor a short time later stated, "He can't testify now. He can't tell the facts now." *Id.* at 50. The Prosecutor then interjected, "He cannot put facts before the jury which have not been proven before through testimony or other evidence. He cannot testify now." *Id.* at 53. Immediately thereafter, the Prosecutor said, "he could have gotten on — you know, he didn't." *Id.* at 54. Finally, the Prosecutor stated, "He's now testifying. He's putting new facts before the jury. He can't do that." *Id.* at 54.

After closing arguments, Dwyer told Dr. Kevorkian and Gorosh that it was necessary to make a record about the Prosecution's references to Dr. Kevorkian's decision not to testify. R., New Trial Br., Exh. A at 5. Gorosh did not want to do this because he thought it would then appear that he was incompetent. *Id.* Attorney Mayer Morganroth, who had been persuaded at this time by Dr. Kevorkian to appear for the first time on behalf of Dr. Kevorkian, convinced Gorosh to make the necessary objection, and preserve the record. *Id.*; March 26, 1999 AM Tr., In Chambers Proceedings at 4-12; March 26, 1999 Tr., In Chambers Proceedings.

When the jury trial was concluded, Dr. Kevorkian was convicted of second degree murder and delivery of a controlled substance. March 26, 1999 Tr., Vol. IV at 6 (Jury Foreman). The Michigan Department of Corrections recommended a downward departure from the Michigan Sentencing Guidelines in its April 8, 1999 Sentence Recommendation to the Trial Court. R., Michigan Department of Corrections Sentence Recommendation. The Sentencing Report indicates

that the facts and circumstances of this case are unusual inasmuch as Thomas Youk was gravely ill and sought Dr. Kevorkian's assistance, among other mitigating circumstances. *Id.* at 2. The Sentencing Report further states that these facts may mitigate Dr. Kevorkian's culpability, and are not adequately taken into account by the sentencing guidelines. *Id.*

Despite the downward departure from the Michigan Sentencing Guidelines recommended by the Department of Corrections, the Trial Court did not deviate from the standard sentencing guidelines and sentenced Dr. Kevorkian to ten to twenty-five years in prison on the second degree murder conviction, and three to seven years in prison for the delivery of a controlled substance. April 13, 1999 Tr. at 38 (The Court).

Dr. Kevorkian filed a timely Motion for a New Trial on May 21, 1999. R., Def.'s Mot. For a New Trial. The Motion for a New Trial was based on affidavits from and conversations with members of the defense team who explained the facts and circumstances of Gorosh's representation of Dr. Kevorkian. R., New Trial Br.; R, New Trial Reply Br. Dr. Kevorkian's Motion sought a new trial on the grounds of ineffective assistance of counsel, or, at a minimum, requested a *Ginther* hearing to properly present and preserve evidence supporting Dr. Kevorkian's claim of ineffective assistance of counsel. *Id.* The Trial Court summarily denied Dr. Kevorkian's Motion, as well as his request for a *Ginther* hearing, without allowing argument, in an Opinion and Order dated July 15, 1999. R., July 15, 1999 Opinion and Order.

Appendix G

ARGUMENT

I. THE TRIAL COURT ERRONEOUSLY DENIED DR. KEVORKIAN'S MOTION SEEKING A NEW TRIAL BASED UPON INEFFECTIVE ASSISTANCE OF COUNSEL.

A. *Standard of Review.*

The standard of review for a motion for granting a new trial is provided by MCR 6.431. The Trial Court may order a new trial on any ground that would support appellate reversal of the conviction or because it believes that the verdict has resulted in a miscarriage of justice. MCR 6.431(b). A new trial may be granted where the verdict is against the great weight of the evidence or to prevent an injustice. *People v. Herbert*, 444 Mich. 466, 475; 511 N.W.2d 654 (1993). This issue was properly preserved for appeal. R., Def.'s Mot. For a New Trial.

B. *The Trial Court Erred in Denying Dr. Kevorkian's Motion for A New Trial Because the Assistance Gorosh Provided Fell Far Below The Constitutional Standards Required For Effective Assistance of Counsel.*

Dr. Kevorkian is guaranteed the right to effective assistance of counsel by both the United States and Michigan Constitutions. The Sixth Amendment to the United States Constitution guarantees an accused "the right . . . to have the assistance of counsel for his defense." U.S. Const., Am. VI.

Appendix G

The Michigan Constitution also guarantees, "[i]n every criminal prosecution, the accused shall have . . . assistance of counsel for his defense." Const. 1963, Art. 1, § 20.

It is well-settled that the right to counsel includes the right to effective assistance of counsel. *McMann v. Richardson*, 397 U.S. 759, 771, n.14 (1970). At issue here is not the denial of counsel, but the actual performance of counsel. *People v. Mitchell*, 454 Mich. 145, 156; 560 N.W.2d 600 (1997). The inquiry into the performance of counsel is particular, and the question is whether counsel's actual performance undermined confidence in the reliability of the result. *Id.*

The benchmark case in Michigan describing the standards for claims of ineffective assistance of counsel is *People v. Pickens*, 446 Mich. 298; 521 N.W.2d 797 (1994). Michigan has adopted the federal test described in *Strickland v. Washington*, 466 U.S. 668 (1984), for reviewing claims of ineffective assistance of counsel. The Michigan Constitutional provision affords the same protection as the Sixth Amendment to the United States Constitution with regard to the guarantee of assistance of counsel. *Pickens*, 446 Mich. at 302. In order to determine whether counsel's assistance was ineffective, the reviewing court must determine: (1) whether counsel's performance was objectively unreasonable; and (2) if so, whether the defendant was so prejudiced by counsel's defective performance that he was deprived of a fair trial. *Pickens*, 446 Mich at 309. The test requires the greatest level of factual inquiry into the conduct of the defense and its effect on the outcome of the trial. *Mitchell*, 454 Mich at 155.

Appendix G

In the case at bar, Gorosh's assistance was inadequate due to numerous errors, miscalculations, and breaches of professional responsibility. The detailed information received from Dwyer, Holmes, Schwartz, and Dr. Kevorkian, as well as the affidavits submitted in support of Defendant's Motion For a New Trial reveal what actually happened during the pre-trial and trial proceedings, and explain why the defense presented on behalf of Dr. Kevorkian was so inadequate. The blame for the deficiencies in presenting a defense on behalf of Dr. Kevorkian falls squarely on the shoulders of Gorosh, who failed to effectively perform his dual roles as advocate and advisor, and left his client without the legal information necessary to present a competent defense.

1. ***Gorosh's performance was objectively unreasonable.***

Gorosh violated the Michigan Rules of Professional Responsibility (the "Rules") during his representation of Dr. Kevorkian. The Rules detail a lawyer's duties as both advisor and advocate. As an advisor, "a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications." MRPC 1.0, *comment*. As an advocate, "a lawyer zealously asserts the client's position under the rules of the adversary system." *Id.* A lawyer also should be competent, prompt, and diligent in all professional functions. *Id.* Defense counsel must perform at least as well as a lawyer with ordinary skill in the criminal law, and must conscientiously protect his client's interests. *People v. Garcia*, 398 Mich. App. 250, 264; 247 N.W.2d 547 (1976).

Here, Gorosh did not perform as well as a lawyer with ordinary skill in criminal law, and he certainly did not conscientiously protect his client's interests. As shown below, Gorosh abdicated these roles, and did not provide Dr. Kevorkian with appropriate advice or advocacy. In fact, Gorosh was at odds with his client throughout most of the representation. R., New Trial Br., Exh. A at 3. Co-counsel, Dwyer, was so concerned about the quality of representation that Dr. Kevorkian was receiving that she was hesitant to be associated with the case. *Id.* at 1.

First, Gorosh was not qualified to handle the defense of Dr. Kevorkian, who was charged with a serious criminal offense, carrying a maximum penalty of imprisonment for life. The Rules state,

A lawyer shall provide competent representation to a client. A lawyer shall not:

(a) handle a legal matter which the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it; [or]

(b) handle a legal matter without preparation adequate in the circumstances. MRPC 1.1.

The comment to Rule 1.1 goes on to state, "[i]n determining whether a lawyer is able to provide competent representation in a particular matter, relevant factors include the relative complexity . . . of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question,

the preparation and study the lawyer is able to give the matter, and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question." MRCP 1.1, *comment*. Additionally, "competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation." *Id.*

According to co-counsel, Dwyer, and Gorosh's former employer, Schwartz, Gorosh was not competent to handle the case, nor to prepare and aid Dr. Kevorkian in presenting his own defense. R., New Trial Br., Exh. A at 2, 4-5, Exh. B at 3-6. Gorosh had minimal experience as he had only been practicing for three years. R., New Trial Br., Exh. B at 1-2. He had limited trial experience, and had never defended a felony case, much less a homicide. *Id.* Gorosh's former supervisor, Schwartz, attests that Gorosh was ill-equipped to serve as lead defense counsel in a significant murder case because of his inexperience, his inability to grasp important strategic considerations, and his failure to consider the best interests of his client. *Id.*

Indeed, the decisions and trial strategies made by Gorosh reveal his inexperience and inability to grasp important strategic considerations. For example, despite the advice of co-counsel, Dwyer, Gorosh moved to quash the assisted suicide count. R., New Trial Br., Exh. A at 2, Exh. C at 3. While the Trial Court dismisses this claim as without merit because the Prosecution ultimately dismissed the assisted suicide charge on their own motion, Gorosh's action was

precisely what brought this to the Prosecutor's attention. R., New Tr. Br., Exh. B at 3-4. The Prosecution had in fact argued to retain the assisted suicide charge until Gorosh's decisions caused the consequences of such action to become clear to them. March 3, 1999 Tr. at 15-19. Gorosh did not even understand why the Prosecution would choose to proceed only with the murder charge. *Id.* at 13. Acting against the advice of co-counsel, Dwyer, and the stated wishes of his client, Gorosh insisted on going forward with the motion to dismiss the assisted suicide charge. R., New Trial Br., Exh. A at 2, Exh. C at 3. Gorosh's former mentor, Schwartz, also warned him on two separate occasions not to move to quash the assisted suicide count. New Trial Br., Exh. B at 3-4. Judge Cooper explicitly told Gorosh that eliminating the assisted suicide count would lead to the exclusion of testimony about the suffering of Thomas Youk's family and about Thomas Youk's medical condition, and was baffled by his strategy to challenge the assisted suicide count in lieu of the murder count. March 3, 1999 Motion Hearing Tr. at 12-13 (the Court).

Notwithstanding his lack of personal competence to handle the case, Gorosh did not associate with any other lawyer who was capable of handling the case in explicit violation of MRPC 1.1(a). Gorosh ignored advice he received from experienced attorneys at his former firm, including advice from Schwartz, an attorney with over twenty-five years experience, and Fieger, an attorney who had successfully defended Dr. Kevorkian in a number of previous assisted suicide cases. R., New Trial Br., Exh. B at 3-4. Regardless of the competence and experience of co-counsel, Gorosh did not listen to her advice, and made all the decisions on his own.

R., New Trial Br., Exh. A at 2. Gorosh completely shut out co-counsel, Dwyer. It became clear to Dwyer that Gorosh was not heeding any of her advice, and she attempted to withdraw. *Id.* Gorosh would not allow this because of the relationship that had developed between Dwyer and Dr. Kevorkian. *Id.* At the same time Gorosh was insisting that Dwyer stay on the case, he refused to keep her informed about the case, and effectively removed her from the decision-making process. Gorosh was running the show, despite his lack of competence to do so alone. *Id.*

Second, Gorosh prepared no defense whatever for his client, Dr. Kevorkian, and did not even challenge the cause of death although there was significant evidence to support raising this question due to Thomas Youk's advanced stage of his ALS. In addition, Gorosh withheld advice in his role as advisor when Dr. Kevorkian decided that Gorosh would not be presenting the case to the jury as an advocate. Gorosh withheld advice during the trial in hope of causing Dr. Kevorkian to feel helpless and turn over all aspects of the case to Gorosh. Gorosh's behavior clearly violated his responsibilities under the Rules. It is well-settled that "the client has the ultimate authority to determine the purposes to be served by legal representation." MRPC 1.2, *comment*. It was Gorosh's obligation to abide by the wishes of his client, Dr. Kevorkian, and provide the type of assistance requested. Instead, Gorosh demanded things be done his way, and ignored or subverted the wishes of his client. R., New Trial Br., Exhs. A, C; R. New Trial Reply Br., Exh. A. When Dr. Kevorkian decided to conduct his own defense and requested only advice from Gorosh, Gorosh was insulted and was unable to function in the capacity of an advisor although he still served in

this capacity. Not only did Gorosh fail to provide the advice Dr. Kevorkian wanted and needed, he also did not allow co-counsel, Dwyer, to sit next to Dr. Kevorkian at trial so that she could provide advice. R., New Trial Br., Exh. A at 4. Gorosh ceased giving his client legal advice, and stood in the way of Dr. Kevorkian receiving legal advice from co-counsel. Refusal of counsel to participate in the course and conduct of his client's trial has been severely criticized by this Court. *People v. Travis*, 182 Mich. App. 389, 395; 451 N.W.2d 641 (1990).

In contravention of the Rules, Gorosh put his own interests ahead of those of his client. R., New Trial Br., Exh. A at 4. Gorosh demonstrated repeatedly that what was most important to him was the attention he received from this case. Gorosh was more concerned about his own reputation, and the effect being removed from the case would have on him, than about the best interests of Dr. Kevorkian. *Id.* at 3-4. Gorosh's desire for the media spotlight and his indignation and displeasure at not conducting the trial caused Gorosh to lose sight of his responsibilities. R., New Trial Br., Exh. C at 4. Gorosh neglected his duty to zealously represent his client, and he put his own interests ahead of his client's interests in violation of MRCP 1.3. R., New Trial Br., Exh. C at 4, Exh. B at 5.

Third, Gorosh did not even interject nor instruct Dr. Kevorkian to make appropriate objections during trial, even though co-counsel, Dwyer, admonished him to do so. Gorosh sat idly by as inappropriate comments were made in the presence of the jury, knowing full well that Dr. Kevorkian did not have the legal training and understanding to make

these objections on his own. *E.g.*, March 25, 1999 Tr. at 50-54. It was Gorosh's duty as an attorney to protect the rights of his client. Dr. Kevorkian needed help as to the proper objections to raise, and as to trial procedure. This is the very sort of legal help and advice Gorosh, as lead defense counsel, was obligated and expected to give his client in his role as advisor. Although Dwyer attempted to prompt Gorosh to object or instruct Dr. Kevorkian to do so, Gorosh failed and refused to do so on numerous occasions throughout the trial, including, but not limited to, instances involving: (1) the Prosecutor's comments about Dr. Kevorkian's decision to avail himself of his Fifth Amendment right not to testify; (2) the Prosecutor's leading questions; (3) the Prosecutor's comments regarding Dr. Kevorkian's intent after the Trial Court prohibited Dr. Kevorkian from presenting evidence regarding his intent; (4) the Prosecutor's comments regarding consent after the Trial Court prohibited Dr. Kevorkian from presenting evidence regarding consent; and (5) the Prosecutor's reference to possible penalty to Dr. Kevorkian. March 25, 1999 Tr., Vol. III at 26, 28-31, 45-46, 50, 53-54 (Skrzynski); March 23, 1999 Tr., Vol. II at 77-79 (Skrzynski).

Fourth, Gorosh allowed the relationships among co-counsel to deteriorate to such a point that it was impossible for them to provide effective assistance to Dr. Kevorkian. Gorosh threatened to tell Judge Cooper that Dwyer's pre-trial motion to quash the murder count was "ridiculous" as Dwyer has reported. He publicly disparaged the work Dwyer was doing on the interlocutory appeal, calling it merely "a lot of pretty words." The defense team was hardly communicating with each other during the trial, and was not functioning as the counsel guaranteed by the Constitution. R., New Trial Br.,

Exhs. A, C; R., New Trial Reply Br., Exh. A. Gorosh refused to listen to, much less heed, the advice of co-counsel as Dwyer has made clear. R., New Trial Br., Exh. A. According to Dwyer, Gorosh promised both Dwyer and another young lawyer that they would participate in the trial, pitting them against each other from the start. This led to bitterness and disagreements when it became evident they would not both participate in the trial.

In fact, Gorosh allowed his relationship with his client, Dr. Kevorkian, to deteriorate to such a point that it was impossible to provide effective assistance. Gorosh's conversations with his client, Dr. Kevorkian, were reduced to shouting matches prior to trial. R., New Trial Br., Exh. A at 3. Gorosh would not allow Dr. Kevorkian to have the counsel of his choice. *Id.* Gorosh indicated Dwyer could not conduct the trial, despite Dr. Kevorkian's wishes. *Id.* In fact, Dwyer has revealed that Gorosh threatened to fire Dwyer and implied that her professional reputation would be damaged if she proceeded to represent Dr. Kevorkian alone. Furthermore, despite Dr. Kevorkian's specific instructions that the other young lawyer was not to be part of the legal team, Gorosh continued to keep the other lawyer present. R., New Trial Br., Exh. A at 3; Exh. C at 3.

Fifth, Gorosh did not maintain adequate communication with Dr. Kevorkian. Rule 1.4 states, "[a] lawyer shall keep a client reasonably informed about the status of a matter and comply promptly with reasonable requests for information." MRPC 1.4(a). A lawyer should maintain communication with a client concerning representation. MRCP 1.0, *comment.* Although Gorosh met with Dr. Kevorkian from time to time

to discuss the case, he merely assured Dr. Kevorkian that everything was being handled. R., New Trial Br., Exh. C at 2. Gorosh, did not however, respond to Dr. Kevorkian's requests for information despite Dr. Kevorkian's repeated inquiries, and never even showed Dr. Kevorkian a complete witness list. R., New Trial Reply Br., Exh. A at 1. Furthermore, Gorosh essentially withheld advise and assistance to his client as communications broke down. R., New Trial Br., Exh. A at 3-4, Exh. C at 3-4. He did not provide the aid and assistance Dr. Kevorkian wanted and needed before and during the trial, and rarely returned Dr. Kevorkian's telephone calls. R., New Trial Br., Exh. C at 3; R., New Trial Reply Br., Exh. A.

Finally, Gorosh's behavior in the courtroom was totally inappropriate. A lawyer has a duty, in accord with his role as an advocate, to "act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." MRCP 1.3, *comment*; MRCP 1.0, *comment*. Gorosh's courtroom behavior was a violation of this duty to zealously represent the interests of his client. In addition to withholding advice and assistance during trial, Gorosh's behavior at counsel table not only was injurious and prejudicial to his client because of the negative impact it may have had on the jury, but it was also undignified and discourteous. R., New Trial Br., Exh. A at 4, Exh. C at 3-4. It was wholly inappropriate for Gorosh to make gestures, roll his eyes, or sigh while Dr. Kevorkian was presenting his case. Gorosh's behavior could only serve to draw the attention of the jury to Gorosh's doubts about his client's defense. According to the defense's own jury consultant, such behavior indicated that Gorosh lacked confidence in

his client. R., New Trial Br., Exh. C at 4. Indeed, the jury could not help but see this behavior because Gorosh insisted on remaining seated next to Dr. Kevorkian at counsel's table, even when Dr. Kevorkian suggested otherwise. Gorosh was cautioned to stop this inappropriate behavior, but did not. R., New Trial Br., Exhs A at 4, C at 3-4; R., New Trial Reply Br., Exh A at 1.

2. *Dr. Kevorkian was prejudiced by Gorosh's unreasonable performance.*

Dr. Kevorkian was materially prejudiced by the poor performance of counsel. There is prejudice to the defendant if there is a reasonable probability that, absent the errors, the finder of fact would have had reasonable doubt respecting guilt. *Pickens*, 446 Mich at 312. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* at 314.

Because of Gorosh's dereliction of his duties as advocate and advisor, Dr. Kevorkian did not receive the "counsel" guaranteed him by the Sixth Amendment, and was thus deprived of his right to a fair trial. Based upon the information and facts received from Dwyer, Holmes and Schwartz, Gorosh flouted his professional responsibilities as stated in the Michigan Rules of Professional Conduct. These Rules emphasize the overarching role of an attorney to perform in the best interests of his client and to zealously protect his client's rights. The Rules further confirm an attorney's responsibility within the legal system to ensure the fair administration of justice. Gorosh's blatant disregard for even the most minimal standards of professional conduct resulted

in the presentation of a defense that was an embarrassment and an affront to the legal system, and thus deprived Dr. Kevorkian of a fair trial.

First, Dr. Kevorkian was deprived of presenting favorable testimony because Gorosh did not properly prepare legal and factual reasons to present to the Court as to why such testimony should be permitted, as more fully explained in Section I(B)(1). Such testimony would have been beneficial to Dr. Kevorkian because it would have shed light on the facts and circumstances surrounding the events that led to his arrest. Such dramatic testimony may very well have provided the jury with reasonable doubt about Dr. Kevorkian's guilt and resulted in Dr. Kevorkian's acquittal. The grounds for admission of such testimony are straightforward, as set forth in Section V, and any reasonably competent attorney would have been able to articulate these reasons to the Trial Court.

Second, Gorosh never challenged the cause of death at any time during the proceedings even though there was evidence to support raising such an issue due to the advanced stage of Thomas Youk's ALS. Indeed, the ALS was listed as a significant contributing factor on the amended death certificate, and Thomas Youk may very well have passed prior to any actions of Dr. Kevorkian when Mr. Youk gasped as revealed on the videotape. March 23, 1999 Tr., Vol. II at 75-78, 90-91 (Dr. Dragovic); March 25, 1999 Tr., Vol. III at 63 (Skrzynski).

Third, Dr. Kevorkian was not adequately prepared by Gorosh to conduct his own defense. Gorosh did not prepare any defense, and essentially abdicated his role as advisor when he learned he would not be conducting the trial. Gorosh became

"more independent, frustrated, and less able to communicate" with Dr. Kevorkian. R., New Trial Br., Exh. A, Exh. C at 4. He did not adequately coach and prepare Dr. Kevorkian for trial, and did not provide the help Dr. Kevorkian wanted and needed. *Id.*; R., New Trial Reply Br., Exh. A. Because of this, Dr. Kevorkian was not able to adequately and competently present any defense to the jury.

Fourth, Dr. Kevorkian was hampered in his Constitutional right to retain the counsel of his choice by Gorosh. While the Trial Court maintains in its Opinion and Order that Dr. Kevorkian could have terminated his representation by Gorosh at any time, the facts do not bear this out. R., New Tr. Br., Exh. A at 3-4. Despite the fact that Dr. Kevorkian indicated he wanted Dwyer to conduct his trial, Gorosh refused to allow this. R., New Trial Br., Exh. A at 3. Gorosh refused to step aside, despite the obvious and insurmountable problems among the defense team. *Id.* The Trial Court neglected to consider the negative ramifications that would have occurred had Gorosh lashed out as a result of his termination as threatened, which certainly would have received intense attention from the media. Because Dr. Kevorkian was not allowed to choose his own counsel, he elected to conduct his own defense, without adequate aid from Gorosh who withheld advice and assistance during the trial since he was upset that he was not personally conducting the defense. R., New Trial Reply Br., Exh. A.

Finally, the Prosecution was able to conduct direct examination of witnesses through leading questions and to make prejudicial and inappropriate statements to the jury, including, but not limited to, statements regarding Dr. Kevorkian's decision not to testify, statements regarding the penalty phase

of the proceedings and statements regarding issues that had been stricken from the case such as intent and consent. Because Gorosh failed to object, or advise Dr. Kevorkian to do so, regarding the misconduct of the Prosecution, Dr. Kevorkian was deprived of a fair trial.

C. *The Trial Court's Opinion and Order Did Not Properly Address the Issues Raised by Defendant in His Motion for a New Trial.*

The Trial Court did not properly address all the issues raised in Dr. Kevorkian's Motion for a New Trial. In its Opinion and Order of July 15, 1999, the Trial Court only addressed a few of the arguments and factual instances raised by Dr. Kevorkian, without conducting oral argument or a *Ginther* hearing although specifically requested by Dr. Kevorkian in his Motion. R., July 15, 1999 Opinion and Order.

The Opinion relies heavily on the fact that Dr. Kevorkian chose to proceed pro se. *Id.* at 2. It was Dr. Kevorkian's wish, however, to use a system of hybrid representation, a plan the Trial Court refused to properly consider.[1] March 19, 1999 Tr. at 12-14. While the Trial Court insists that Dr. Kevorkian intended to use his right to self-representation as both a

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1. The Trial Court misconstrued the applicable law, and determined that a court cannot consider a request for hybrid representation. But under Michigan law as well as federal law, hybrid representation can be and has been allowed in appropriate situations. *See, e.g., People v. Ramsey*, 89 Mich. App. 22; 198 N.W.2d 811 (1972); *People v. Griffen*, 36 Mich. App. 368, 372; 194 N.W.2d 104 (1971); *United States v. Hill*, 526 F.2d 1019, 1024 (C.A. 10, 1975); *United States v. Tutino*, 883 F.3d 60, 67 (C.A. 2 Cir., 1989); *cert. den.*, 493 U.S. 1081 (1990).

"sword and a shield," this was not the case. The facts bear out that Dr. Kevorkian did not represent himself without relying upon assistance from counsel. Gorosh acted as Dr. Kevorkian's advocate at times and as advisor at other times throughout the course of the proceedings, and as such, Dr. Kevorkian was entitled to the effective assistance of counsel, which he did not receive.

It is undisputed that Gorosh acted as an advocate for Dr. Kevorkian in presenting various pre-trial motions. *E.g.*, March 22, 1999 Tr., Vol. I at 8. In fact, Gorosh filed a formal notice of appearance, filed motions and briefs, responded to Prosecution motions, and appeared at pre-trial hearings, including the preliminary examination, arraignment, and the hearing wherein Gorosh moved to quash the assisted suicide count. *See*, R., December 17, 1998 Appearance; January 29, 1999 Mot. To Quash the Information; March 16, 1999 Def.'s Mot. For Recons.; February 12, 1999 Def.'s Resp. to Prosecution's Mot. To Preclude Defenses; February 12, 1999 Def's Resp. to Prosecution's Mot. For Special Jury Instructions; February 12, 1999 Def.'s Resp. to Prosecution's Mot. To Modify; February 12, 1999 Def.'s Resp. to Prosecution's Mot. For Jury Instructions; February 12, 1999 Def.'s Resp. to Prosecution's Mot. To Preclude Definition; February 12, 1999 Def.'s Resp. to Prosecution's Mot. To Exclude Testimony; February 12, 1999 Def.'s Resp. to Prosecution's Mot. In Limine; December 9, 1998 Preliminary Examination Tr. at 3; December 16, 1998 Arraignment Tr. at 3; December 22, 1998 Tr. of In Chambers Proceedings at 3; February 1, 1999 Hearing Tr. at 3; February 16, 1999 Tr. of In Chambers Proceedings at 3; March 3, 1999 Mot. Tr. at 3, 56; March 12, 1999 Dismissal of Count II Tr. at 3; March 16, 1999 Mot. Tr. at 3-4; March 19, 1999 Hearing Tr. at 3.

It is further undisputed that Gorosh also acted as an advocate at times during the trial. For instance, Gorosh prepared and signed the Motion for Introduction of Thomas Youk's Medical Condition filed during trial, and Gorosh was present during in chambers conferences held during the trial. R., Def.'s Trial Mem. of Law; Def.'s Mot. For Recons.; March 23, 1999 Tr. of In Chambers Proceedings at 3; March 25, 1999 Tr., Vol. III at 3; March 26, 1999 A.M. Tr. of In Chambers Proceedings at 3; March 26, 1999 P.M. Tr. of In Chambers Proceedings at 3.

Even assuming *arguendo* that Gorosh did not act as Dr. Kevorkian's advocate during the trial, it is undisputed that Gorosh at least acted as a counselor and advisor to Dr. Kevorkian. The Trial Court required Gorosh to sit at counsel table, and instructed Dr. Kevorkian to seek advice from his attorneys on numerous occasions. March 22, 1999 Tr., Vol. I at 10-11, 237, 247, 268; March 23, 1999 Tr., Vol. II at 95, 98, 101, 145; March 23, 1999 In Chambers Proceedings Tr. at 25-27; March 25, 1999 Tr., Vol. III at 3. Dr. Kevorkian even indicated his intent to follow the advice of his advisers throughout the trial. March 23, 1999 Tr. In Chambers Proceedings at 12-13. In that capacity, Gorosh was obligated to provide, and Dr. Kevorkian was entitled to receive, effective advice and consultation as to how to conduct his own defense.

The Trial Court's Opinion emphasizes the fact that the Court repeatedly asked Dr. Kevorkian if he was certain he wanted to proceed pro se, and that Dr. Kevorkian knowingly and voluntarily waived his right to counsel. However, at the very times that the Trial Court was asking him if he was

certain he wanted to waive his right to counsel, it was allowing and encouraging Dr. Kevorkian to consult with counsel, and to have the aid of counsel in the courtroom at counsel table and on written briefs. March 22, 1999 Tr., Vol. I at 8-10; March 23, 1999 Tr. of In Chambers Proceedings at 25-26; March 25, 1999 Tr., Vol. III at 3. Thus, Dr. Kevorkian's waiver could not have been effective as to all aspects of representation, because even as he waived his right to counsel, he continued to have counsel, with the Trial Court's approval. Indeed, Dr. Kevorkian was under the impression that he was represented by counsel throughout the trial, and that his role was to be that of a mouthpiece to present information prepared by his counsel. March 22, 1999 Tr., Vol. 1 at 268; March 23, 1999 Tr., Vol. II at 137; March 23, 1999 Tr., In Chambers Proceedings at 12-13, 25-26.

Because Gorosh did act as both advocate and advisor, the entire foundation of the Trial Court's Opinion denying Dr. Kevorkian's Motion for a New Trial unravels.

II. THE TRIAL COURT ERRONEOUSLY DENIED DR. KEVORKIAN'S MOTION FOR A NEW TRIAL BASED ON THE DOCTRINE OF SERIOUS MISTAKE OF COUNSEL.

A. *The Standard for a New Trial Based on A Serious Mistake By Counsel.*

Dr. Kevorkian, is entitled to a new trial pursuant to MCR 6.431 due to serious mistakes made by Gorosh as lead defense counsel under Michigan Common Law. In addition to the Constitutional claim of ineffective assistance of

counsel, Michigan jurisprudence also recognizes the "serious mistake of counsel" doctrine as another avenue for a defendant to show he is entitled to a new trial based on deficient representation. Even where the assistance of counsel satisfies the Constitutional requirement, a defendant still has a common law right to a fair trial which may be denied if his attorney makes a serious mistake. *People v. Sealy*, 136 Mich. App. 168, 175-176; 356 N.W.2d 614 (1984); *People v. Smith*, 108 Mich. App. 338, 343; 310 N.W.2d 235 (1981); *People v. Lotter*, 103 Mich. App. 386, 389; 302 N.W.2d 879 (1981).

In deciding whether to grant a new trial based on a serious mistake of counsel, a reviewing court should balance the public's interest in avoiding purposeless retrials against a defendant's interest in having all his rights recognized and asserted. *People v. DeGraffenreid*, 19 Mich. App. 702, 718; 173 N.W.2d 317 (1970). A new trial should be granted if it appears that the defendant may be acquitted if the mistake is not repeated. *Id.*; *Lotter*, 103 Mich. App. at 389.

This issue was properly raised in the Trial Court. R., New Trial Br.

B. *Gorosh Made Several Serious Mistakes That Warrant a New Trial.*

Gorosh made several serious mistakes as an advocate and advisor to Dr. Kevorkian, and in the absence of such serious mistakes, Dr. Kevorkian may very well have been acquitted. *See*, Section I(B)(1) and (2). Clearly here, due to the serious mistakes made by Gorosh, another trial would serve to protect Dr. Kevorkian's rights, and would further

serve the public interest in seeing a fair and thorough administration of justice, particularly in a case as controversial and emotional as the one at bar.

III. THE PROSECUTOR'S IMPERMISSIBLE COMMENTS ABOUT DR. KEVORKIAN'S DECISION NOT TO TESTIFY DEPRIVED DR. KEVORKIAN OF HIS ABSOLUTE RIGHT AGAINST SELF-INCRIMINATION, AS GUARANTEED BY THE CONSTITUTION AND LAWS OF THE STATE OF MICHIGAN, AND THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

A. *Standard of Review.*

Under the Michigan Constitution, whether a prosecutor's comments about a defendant's decision not to testify amount to error so grievous as to necessitate a mistrial is left to the discretion of the trial judge, and reviewed under an abuse of discretion standard. *People v. Jansson*, 116 Mich. App. 674, 690; 323 N.W.2d 508 (1982).

As to the Fifth Amendment to the United States Constitution, the Sixth Circuit has explained its criteria for examining indirect references by a prosecutor to a defendant's failure to testify. The reviewing court must examine four factors: (1) were the comments intended to reflect on the accused's silence or of such a character that the jury would naturally and necessarily take them as such; (2) were the remarks isolated or extensive; (3) was the evidence of guilt otherwise overwhelming; and (4) what curative instructions

were given and when. *Lent v. Wells*, 861 F.2d 972, 975 (C.A. 6, 1988). The statements must be viewed in context, "not singled out and standing alone," and in the aggregate. *Id.* at 976; *Berryman v. Colbert*, 387 F.Supp. 378, 380 (E.D. Mich. 1974).

If the reviewing court determines that there was error, it must further determine if the error was harmless. *Lent*, 861 F.2d at 975 "Harmless error, in the context of the violation of a Constitutional Right of a defendant is an extremely narrow standard permitting the state to avoid retrial of a defendant only when it can demonstrate beyond a reasonable doubt that the error did not contribute in any way to the conviction of the defendant." *Id.* at 977. The reviewing court must make a determination whether, absent the prosecutor's allusion to the accused's failure to testify, it is clear beyond a reasonable doubt that the jury would have returned a verdict of guilty. *United States v. Hastings*, 461 U.S. 499, 510-511 (1982). In *Lent*, while the Sixth Circuit agreed the case was certainly strong enough to find a defendant guilty, the state had still not demonstrated *beyond a reasonable doubt* that the Constitutional error was harmless. *Lent*, 861 F.2d at 977.

This issue was properly raised in the Trial Court as a motion for a mistrial. March 26, 1999 A.M. Tr. of In Chambers Proceedings at 3-13.

B. *The Prosecutor's Impermissible Comments Violated Dr. Kevorkian's Rights Under the Constitution of the United States As Well As the Constitution and Laws of the State of Michigan.*

The Fifth Amendment to the United States Constitution states, "No person . . . shall be compelled to be a witness against himself." U.S. Const. Am. V. This provision was made applicable to the states via the Fourteenth Amendment in *Malloy v. Hogan*, 378 U.S. 1, 6 (1964). The right of an accused not to be punished for the exercise of his Fifth and Fourteenth Amendment right to remain silent is a federal right, to be protected in accordance with the decisions of the Supreme Court and the lower federal courts. *Chapman v. California*, 386 U.S. 18, 21 (1967).

In *Griffin v. California*, 380 U.S. 609, 615 (1965), the United States Supreme Court held that the prosecution may not comment on the accused's silence, expanding on the general rule set forth in *Miranda v. Arizona*, 384 U.S. 436 (1966), that the prosecution may not use at trial the fact that the accused claimed his privilege against self-incrimination in the face of accusation. Any comment by the prosecution on the refusal of the accused to testify is a remnant of the inquisitorial system of criminal justice, outlawed by the Fifth Amendment. *Griffin*, 380 U.S. at 614. Permitting such comment by the prosecution amounts to a penalty imposed by courts on the exercise of a constitutional privilege. *Id.* Whether a jury may draw a negative inference *on its own* from the accused's failure to testify is vastly different than the court solemnizing such silence into evidence against the accused, and such court action is prohibited. *Id.*

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Furthermore, the United States Supreme Court, in construing the right of a person to remain silent has stated flatly that a person may "suffer no penalty . . . for such silence." *Malloy*, 378 U.S. at 8; *Spevack v. Klein*, 385 U.S. 511, 514 (1966). A penalty for silence includes the "imposition of *any sanction* which makes assertion of the Fifth Amendment privilege costly." *Spevack*, 385 U.S. at 515 (citation omitted, emphasis added). The Supreme Court has cautioned that even the slightest encroachments on Constitutional rights are prohibited, and the privilege against self-incrimination is to be construed liberally. *Id.* at 515-516; *See also*, *Coppola v. Powell*, 878 F.2d 1562, 1566 (C.A. 1, 1989) (the privilege against self-incrimination should be given liberal application).

> It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely by silent approaches and slight deviations from legal modes of procedure. *This can be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed.* A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. *It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealth encroachments thereon. Spevack*, 385 U.S. at 515 (citation omitted, emphasis added).

Thus, courts must guard against even the subtlest implications by the prosecution alluding to the accused's decision to exercise his/her Fifth Amendment right.

Similar to the Fifth Amendment, Article I, § 17 of the Michigan Constitution states, "No person shall be compelled in any criminal case to be a witness against himself." Michigan statutes also emphasize the privilege against self-incrimination. MCL § 600.2154 requires that a witness answer questions, but provides the explicit exception that "this provision shall not be construed to require a witness to give any answer which will have a tendency to accuse himself of any crime or misdemeanor." MCL § 600.2159 states, "(A) defendant in any criminal case or proceeding shall only at his own request be deemed a competent witness, and his neglect to testify shall not create any presumption against him, *nor shall the court permit any reference or comment to be made to or upon such neglect*." (emphasis added). Furthermore, Michigan has aligned itself with those states which have given the constitutional provision against self-incrimination a liberal construction. *Moll v. Danzinger*, 238 Mich. 39, 42; 213 N.W. 448, 449 (1927) (referring to Art. 2, § 16 of the 1908 Michigan Constitution, which is identical to the current Michigan Constitutional provision against self-incrimination). Under Michigan law, it is the duty of the courts to liberally construe the prohibition against self-incrimination in favor of personal rights, and refuse to permit any steps tending towards their invasion. *Id.* The Supreme Court of Michigan has further stated that "safeguards against self-incrimination are to be *vigilantly and vigorously protected*." *People v. Joseph*, 384 Mich. 24; 179 N.W.2d 383, 388 (1970) (emphasis added). It is well-settled under Michigan

law that comment by a prosecutor upon a defendant's right to remain silent constitutes clear error. *Jansson*, 116 Mich. App. at 690. This Court has made clear that criminal defendants have a right to remain silent at trial, and no references or comments are to be made to subvert that right. *Balog*, 56 Mich. App. at 629. This Court has further made clear that it is impermissible to inform the jury that defendant has exercised his right to remain silent. *People v. Bell*, 32 Mich. App. 375; 188 N.W.2d 909 (1971).

In the case at bar, the Prosecution violated Dr. Kevorkian's constitutional rights under federal and state law when the Prosecutor made comments during the trial which were clearly of such a character that a jury would naturally and reasonably take them as a reference to Dr. Kevorkian's decision not to testify. Whether the jury would naturally construe the comments to reflect on Dr. Kevorkian's failure to testify requires a probing analysis of the context of the comments, and the likely effects of any curative instruction given by the Trial Court. *See*, *Lent*, 861 F.2d at 977.

By closely examining the comments made by the Prosecutor, it is clear the jury would understand that the Prosecutor repeatedly referred to Dr. Kevorkian's failure to testify. During Dr. Kevorkian's closing argument, the Prosecutor made at least four comments in a very short period of time, during Dr. Kevorkian's closing argument, alluding to Dr. Kevorkian's failure to testify. The Prosecutor said, "*He can't testify now. He can't tell the facts now.*" March 25, 1999 Tr., Vol. III at 50. (emphasis supplied). The Prosecutor objected again a short time later saying, "He cannot put facts before the jury *which have not been proven before through testimony or other evidence. He cannot*

testify now." *Id.* at 53. (emphasis supplied). The Prosecutor continued to state, *the defendant "could have gotten on — you know, he didn't*." *Id.* at 54. (emphasis supplied). Although the Prosecutor did not use the word "stand," everyone in the courtroom was able to fill in the blank with the word "stand" since that is the natural and expected finish of the Prosecutor's sentence. Any juror was able to extrapolate this especially in light of the clear context of the Prosecutor's comments that Dr. Kevorkian "cannot testify now," but "could have" and "didn't." Finally, the Prosecutor went on to object saying, "*He's now testifying. He's putting new facts before the jury. He can't do that*." *Id.* (emphasis supplied). In addition to these inappropriate comments, the Prosecutor also pointed out during his closing that "He [Dr. Kevorkian] turns the videotape off and he goes back to work apparently. We don't know exactly what he does. And why does he turn it off? Why doesn't he keep the whole thing on all the time." March 25, 1999 Tr., Vol. III at 32 (Skrzynski). This too is an indirect but clear reference to the lack of answers due to Dr. Kevorkian's decision not to testify.

When viewed in this context, the remarks were extensive. The Prosecutor hammered the point home to the jurors that Dr. Kevorkian had not testified. Because of the short period of time in which all the comments were made (between pages 32-33 and then between pages 50-54 of the March 25, 1999 transcript), the message was crystal clear. Furthermore, these comments were made during closing argument, and were one of the last things jurors heard before retiring to deliberate. It is reversible error to specifically refer to the failure of defendant to take the stand. *People v. Alexander*, 17 Mich. App. 497; 169 N.W.2d 652 (1969).

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In *People v. Mancill*, 393 Mich. 132; 223 N.W.2d 289 (1974), the Supreme Court of Michigan remanded for a new trial a case in which the prosecutor commented during summation that a defendant "does not have to take the stand at all and there are times when it is better if [he] did not take the stand." *Mancill*, 393 Mich. at 132. The Court said, "the prosecutor's conduct constituted a serious infringement upon defendant's constitutional rights," and granted a new trial. *Id.*

The Sixth Circuit has held that even indirect references to the defendant's failure to testify are sufficient to require a new trial. In *Lent*, the prosecutor made repeated references in his closing argument to "uncontradicted evidence" where it was clear the only person who could contradict the evidence was the defendant. *Lent*, 861 F.2d at 974-975. Specifically, the prosecutor stated that "[the defense attorney] is going to get up here and say, well, this could've been, and that could've been. Well could've been didn't take the stand." *Id.* at 974. This is very similar to the statement in the case at bar in which the Prosecutor said the defendant "could have gotten on – you know, he didn't." March 25, 1999 Tr. at 54.

The United States District Court For the Eastern District of Michigan on a writ of habeas corpus reversed a Michigan Court of Appeals decision, and ruled that the following statement of the prosecution during closing argument was impermissible. The prosecutor said, "Now finally, to establish the robbery murder, we are relying almost entirely upon circumstantial evidence. Nobody was there when the robbery took place. Nobody that we can bring here to testify. The defendant's here, yes, but we can't get them to testify."

Berryman, 387 F.Supp. at 379. The court said this was "clearly improper argument" and "the bounds of legitimacy were transgressed." *Id.* at 380.

In this case, with the Prosecutor's comment that Dr. Kevorkian could have taken the stand as a backdrop, the jury would perfectly well understand that each of the Prosecutor's other comments about giving testimony directly related and referred to the fact that Dr. Kevorkian exercised his Constitutional right and chose not to testify. Therefore, these comments satisfy the standard established by the Sixth Circuit, and necessitate a new trial in order that Dr. Kevorkian's absolute constitutional rights under federal and state law be properly safeguarded.

While federal and Michigan law recognize that a curative instruction can ameliorate possible error, no such curative instruction was given here to even attempt to negate the impermissible comments made by the Prosecutor. The only instruction that could possibly relate to the Prosecutor's comments was given during final jury instructions when the Trial Court read the standard jury instruction stating that every defendant has a right not to testify. March 25, 1999 Tr., Vol. III at 72. The failure to give a specific curative instruction at the time that the Prosecutor made the statements about Dr. Kevorkian's failure to testify precluded the possibility of negating the prejudicial effect of the impermissible comments.

In *People v. Wessel*, 256 Mich. 72; 239 N.W. 259 (1931), the Supreme Court of Michigan found that the form of a specific curative instruction used was ineffective even though

it was given when the impermissible comments were made. In *Wessel*, 256 Mich. at 73-74, the defendant did not take the stand, and the following colloquy took place during argument:

> Mr. Pellow: I stated in my opening statement that I would prove that Louis Wessel was under the influence of liquor, and he hasn't denied it.
>
> Mr. Landers: Now I object to that argument and take exception to it, and ask the court to instruct the jury to disregard it.
>
> Mr. Pellow: I am not commenting on the fact that he didn't take the stand, but I am —
>
> The Court: Now, now, now Mr. Pellow, that remark is entirely improper . . . The jury will be very careful to disregard that remark entirely.

The Michigan Supreme Court held that the error was not cured by the court's instruction. The Michigan Supreme Court warned that the Constitutional provision "that one cannot be compelled to be a witness against himself is rendered of little or no force, if by adverse criticism or argument, the exercise of the right is treated as a circumstance against [the defendant]." *Id.*

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In *People v. Lay*, 193 Mich. 17; 159 N.W. 299 (1916), the Supreme Court of Michigan even ordered a new trial where the trial court specifically instructed the jury to disregard the prosecutor's comments immediately after such comments had been made, finding that the form was insufficient. In *Lay*, the following colloquy occurred:

> Prosecutor: I have not a word to say about this respondent or Mr. Palmer testifying here, but I do have a word to say about this . . .
>
> Defense: I except to that part of the argument.
>
> The Court: I will say that the prosecuting attorney has no right to comment upon the failure of the accused to testify, and he should refrain from making any comment or suggestion of any sort relative to the failure of the respondent to testify, and the jury will disregard the same absolutely. *Lay*, 193 Mich. at 31.

While the form of foregoing explicit instructions to disregard a prosecutor's impermissible statements, given right after the impermissible comments, were held to be insufficient, the trial judge in the case at bar gave *no special curative instruction at all*, and the jury retired to deliberate immediately after hearing the Prosecutor's impermissible comments about Dr. Kevorkian's decision not to testify. The Constitutional provision against self-incrimination is to be cautiously guarded, and thus the behavior of the Prosecutor in this case mandates a new trial on these grounds.

IV. THE TRIAL COURT ERRONEOUSLY DENIED DR. KEVORKIAN'S MOTION TO DISMISS BASED ON THE NINTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 17 AND 23 OF THE MICHIGAN CONSTITUTION.

A. *Standard of Review for Constitutional Issues.*

The Michigan Court of Appeals applies a *de novo* standard when reviewing Constitutional questions. *People v. Pitts*, 222 Mich. App. 260; 564 N.W.2d 93 (1997); *People v. White*, 212 Mich. App. 298; 536 N.W.2d 876 (1995).

This issue was properly raised in the Trial Court. R., Def.'s Mot. to Dismiss; R., February 19, 1999 Opinion and Order.

B. *Dr. Kevorkian's Actions In Helping Thomas Youk to End His Unbearable Pain and Suffering Are Constitutionally Protected by the Ninth and Fourteenth Amendments to the United States Constitution and Article 1, Sections 17 and 23 of the Michigan Constitution.*

Both the Michigan and United States Constitutions guarantee that a person shall not be deprived of liberty. U.S. Const., Am. XIV; Const. 1963 Art. I, § 17. These guarantees of liberty should be construed to include a Constitutional right of a patient to be free from unbearable pain and suffering.

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The Fourteenth Amendment to the United States Constitution states, in pertinent part, "No state . . . shall deprive any person of life, liberty, or property, without due process of law." U.S. Const., Am. XIV. Similarly, Article 1, Section 17 of the Michigan Constitution states, in pertinent part, "No person . . . shall be deprived of life, liberty or property, without due process of law." Const. 1963, art. 1, § 17.

The Ninth Amendment and the almost identical words of Article 1, Section 23 of the Michigan Constitution explicitly state that certain unenumerated rights are reserved to the People, and are not to be abridged by the government. U.S. Const., Am. IX; Const. 1963, Art. 1, § 23.

Traditional Constitutional interpretation requires that every word has its due force and meaning. *Ogden v. Saunders*, 25 U.S. (12 Wheat) 213 (1827). Logically then, there must be some unenumerated rights protected by the Ninth Amendment to the United States Constitution and Article 1, Section 23 of the Michigan Constitution. Such unenumerated rights, like the rights specifically set out in the first eight amendments to the United States Constitution, are specifically reserved to the People.

If the Ninth Amendment is to have any substantive meaning, as required under traditional rules of Constitutional construction, a right to be free from inexorable pain and suffering must be among the unenumerated rights protected by the Ninth Amendment and Article 1, Section 23 of the Michigan Constitution. This Honorable Court should recognize such a right, and give it force through the guarantees of the Ninth Amendment to the United States Constitution and Article 1, Section 23 of the Michigan Constitution.

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The United States Supreme Court has broadly construed the right to liberty guaranteed by the Fourteenth Amendment to include various rights, including the right to certain medical procedures. The United States Supreme Court has recognized that the right to privacy is part of the "liberty" protected by the Fourteenth Amendment. *Roe v. Wade*, 410 U.S. 113 (1973). In *Roe*, the right to privacy inherent in the "liberty" protected by the Fourteenth Amendment was held to guarantee a woman's right to the medical procedure of abortion prior to viability.

Likewise, the Constitutional right at issue here is the intensely personal and private right of a patient to be free from intolerable and irremediable suffering due to a medical condition. The United States Supreme Court and almost every state have implicitly acknowledged this right, supporting the view that the administration of aggressive pain-killing drugs is acceptable, even if this may hasten death. *Vacco v. Quill*, 521 U.S. 793 (1997). The necessary and direct corollary of this position is that a person should not be forced to suffer unbearably. In some cases, this right can simply be assured by a doctor providing sufficient pain medication, even at the risk of hastening death. But in other situations, such as the case at bar, the only medical way to end the interminable suffering of patients such as Thomas Youk is to provide them with an injection to permanently end their suffering. Thus, the right to be free of unbearable pain and suffering caused by a medical condition is inherently part of the "liberty" secured by the Fourteenth Amendment, as well as one of the unenumerated rights reserved to the People by the Ninth Amendment.

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There is no more personal and fundamental right than the right to be free from intolerable and unending pain and suffering due to an incurable medical condition. This right is so basic and fundamental, it is a perfect example of one of the unenumerated but still protected rights reserved exclusively to the People, and not subject to abridgment by the government.

In *Washington v. Glucksburg*, 521 U.S. 702 (1997), the United States Supreme Court held that there is no Constitutional right to physician-assisted suicide, but premised its holding on the fact that a *patient could receive adequate pain medication to alleviate his suffering, even if doing so would hasten the patient's death*. Justice O'Connor stated that it was not necessary for the Court in *Glucksberg* to reach the question of "whether a mentally competent person who is experiencing great suffering has a constitutionally cognizable interest in controlling the circumstances of his or her imminent death." *Id.* at 737 (O'Connor, J., concurring). The Court did not reach this question in *Glucksberg* and *Vacco* because it was undeniable that the dying patients in those cases had access to adequate medication to relieve their pain.

Justice Breyer, in *Glucksberg*, acknowledged that the right to be free from unbearable pain would be central to any constitutional claim of a right to hasten inevitable death, and that if such a situation were presented, the Court might have to revisit its conclusions. *Glucksberg*, 512 U.S. at 792 (Breyer, J., concurring). Justice Breyer further acknowledged that medical care allows for the alleviation of pain in all but a few individuals. *Id.* at 791-792. For these individuals the only solution to the unbearable pain is sedation, which can

result in a coma. *Id.* Such a result would lead to the situation in *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990), where the Supreme Court recognized the right of a comatose person on life support to remove such medical equipment, even though it would hasten death. It is infinitely more sensible to recognize the right of those with unbearable pain *that can not be alleviated by medical means short of sedation leading to coma* to take any and all affirmative steps necessary to alleviate this pain.

Justice Stevens, in *Glucksberg*, likewise indicated that where palliative care was inadequate to eliminate pain and suffering, the state's interest in preventing potential abuse and mistake would be only minimally implicated and he would not "foreclose the possibility that an individual plaintiff seeking to hasten her own death, *or a doctor whose assistance was sought*, could prevail in a more particularized challenge." *Glucksberg*, 521 U.S. at 750 (Stevens, J., concurring, emphasis added). Justice Stevens noted that state concerns against abuse will not always outweigh the individual liberty interests of a particular patient. *Id.* at 749-750. Justice Stevens further stated that, "avoiding intolerable pain and the indignity of living one's final days incapacitated and in agony is certainly at the heart of the liberty . . . to define one's own concept of existence." *Id.* at 745 (internal citation omitted). Justice Stevens indicated that "some intrusions on the right to decide how death will be encountered are also intolerable." *Id.* Justice Stevens finally acknowledges that "a doctor who prescribes lethal medication does not necessarily intend the patient's death–rather that doctor may seek simply to ease the patient's suffering and to comply with her wishes." *Id.* at 751.

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Justice Souter, in *Glucksberg*, suggested that the Fourteenth Amendment's guarantee of liberty might be the "only possible means of preserving a dying patient's dignity and alleviating her intolerable suffering." *Glucksberg*, 521 U.S. at 752 (Souter, J., concurring).

Thus, Justices on the Supreme Court have suggested allowing for interpretation of the Fourteenth Amendment's guarantee of liberty to apply to various privacy rights, including those related to personal and private medical procedures. *See*, *Roe v. Wade*, *supra*. The holdings in *Glucksberg* and *Vacco* that the right of the terminally ill to hasten inevitable death was not a fundamental right for Constitutional purposes was clearly predicated on the fact that the terminally ill person was being provided adequate pain medication and was not undergoing unbearable suffering. Under *Glucksberg*, a terminally ill person does have a right to receive adequate pain medication, even if this has the effect of hastening their inevitable death.

For Thomas Youk, a person in the end stages of a fatal and unforgiving disease, pain medication could no longer relieve his suffering. This is clear from the videotapes introduced into evidence, and would be further expounded upon by the testimony of Melody and Terry Youk, which was not permitted to be presented at trial.

The only medical relief for Thomas Youk's condition was the relief he sought from Dr. Kevorkian. The injection Dr. Kevorkian gave to Thomas Youk was the only effective medical way to alleviate Thomas Youk's unbearable suffering. No pain medication would suffice, and there was no other beneficial medical alternative that would have aided Thomas Youk.

Thus, Dr. Kevorkian requests this Court to follow the logical implications of *Glucksburg* and *Vacco*, and recognize a Constitutional right to be free from unbearable pain and suffering.

C. *Dr. Kevorkian Can Not Be Prosecuted For Aiding in Thomas Youk's Assertion of His Constitutional Right to be Free from Intolerable Pain and Suffering.*

Dr. Kevorkian has standing to assert Thomas Youk's Constitutional rights to be free from intolerable pain. It has been held that physicians and clinics performing first trimester abortions have standing to assert their patients' due process rights as regards state regulation of abortion facilities. *Birth Control Ctr., Inc. v. Reizen*, 743 F.2d 352, 360 (C.A. 6, 1984). Similarly here, Dr. Kevorkian's provision of a Constitutionally guaranteed medical service does allow him to assert the Constitutional rights of his patient guaranteed by the Ninth and Fourteenth Amendments to the United States Constitution and Article 1, Sections 17 and 23 of the Michigan Constitution. In fact, Justice Stevens recognized the possibility that an individual who provides assistance to a patient who was suffering interminably could prevail on a Constitutional challenge. *Glucksberg*, 521 U.S. at 750 (Stevens, J., concurring).

If this Honorable Court agrees, based on precedent and fundamental human rights, that Thomas Youk had a Constitutionally protected right to be free from unbearable suffering, it must then recognize that the prosecution of Dr. Kevorkian for helping Thomas Youk put an end to his

suffering at the request of Mr. Youk is unconstitutional on its face, and the charges against Dr. Kevorkian must be dismissed.

V. THE TRIAL COURT CLEARLY ERRED BY REFUSING TO ALLOW THE TESTIMONY OF *RES GESTAE* WITNESSES TERRY AND MELODY YOUK.

A. *Standard of Review.*

It is within the trial court's discretion to admit or exclude evidence. *Department of Transp. v. Campbell*, 175 Mich. App. 629, 631; 438 N.W.2d 267 (1988). However, the trial court's decision must be reversed when it abuses this discretion. *Johnson v. City of Detroit*, 79 Mich. App. 295, 300; 261 N.W.2d 295 (1977).

> [T]his Court has not hesitated to reverse when abuse of discretion has led to a denial of substantial justice. In particular, when competent, material, and relevant evidence on an essential issue has been excluded, when the party offering the evidence has received an adverse factual determination of that issue, and when consideration of the excluded testimony might have resulted in a different finding, this Court has held the exclusion to be reversible error. *Id.*

Justice requires that a party be given an evaluation of evidence by the trier of fact rather than an evaluation of it by an appellate court, and therefore Dr. Kevorkian is entitled to

a new trial in which he may present all relevant evidence to a jury. *New York Cent. R.R. Co. v. Michigan Milk Producers Assoc.*, 3 Mich. App. 648, 652; 143 N.W.2d 590 (1966).

B. *The Testimony of Melody and Terry Youk was Necessary Inasmuch as they Are Res Gestae Witnesses.*

The Trial Court clearly erred in its refusal to allow the testimony of Terry and Melody Youk, the brother and wife of Thomas Youk. The Youks were relevant witnesses for the defense, and it is clear that their testimony should have been allowed under the Rules of Evidence and well-settled Michigan precedent.

The Youks were *res gestae* witnesses.

> A *res gestae* witness is an eyewitness to *some event in the continuum of a criminal transaction* whose testimony would aid in the full disclosure of the facts surrounding the alleged commission of an offense. *The witnesses need not be an eye-witness to the actual crime.* It is the prosecution's duty to indorse and produce at trial *all res gestae witnesses*. *People v. Johnson*, 164 Mich. App. 634, 644 at n. 3; 418 N.W.2d 117 (1987) (emphasis added), *citing*, *People v. Baskin*, 145 Mich. App. 526, 530-531; 378 N.W.2d 535 (1985) (per curiam); *Accord*, *People v. Austin*, 95 Mich. App. 662, 674-675; 291 N.W.2d 160 (1980).

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A *res gestae* witness is one whose testimony is necessary to illuminate an important area of the case. *People v. Johnston*, 76 Mich. App. 332, 337; 256 N.W.2d 782 (1977). The purposes of the testimony of *res gestae* witnesses are to present the *entire* transaction to the trier of fact, protect the accused from false accusations, and *protect the accused from the suppression of testimony favorable to him. People v. Hernandez*, 84 Mich. App. 1, 13; 269 N.W.2d 322 (1978); *People v. Szymanski*, 52 Mich. App. 605, 610; 218 N.W.2d 95 (1974); *People v. Hicks*, 63 Mich. App. 595, 597; 234 N.W.2d 720 (1975).

Persons present at the scene of a crime are presumed to be *res gestae* witnesses, and the prosecution must prove otherwise to avoid indorsement and production. *People v. Lamar*, 153 Mich. App. 127, 137-138; 395 N.W.2d 262 (1986). In any case, a person need not be present at the scene of the crime to be a *res gestae* witness, so long as his or her testimony would assist in developing a *full disclosure of the facts. People v. Reynolds*, 93 Mich. App. 516, 521; 286 N.W.2d 898 (1980); *Baskin*, 145 Mich. App. at 531. The *res gestae* witness rule encompasses not only eyewitnesses, but all witnesses whose testimony may aid in the making of a *fair presentation of the res gestae of the crime charged. Baskin*, 145 Mich. App. at 530-531, 535. Every reasonable doubt as to whether a witness is a *res gestae* witness should be resolved in favor of indorsing and calling the witness. *Austin*, 95 Mich. App. at 674; *People v. Doyan*, 116 Mich. App. 356, 363; 323 N.W.2d 397 (1982).

Not only was the Youks' testimony admissible, but the Prosecutor himself was obligated to call the Youks to the stand. Melody and Terry Youk were listed on the Waterford

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Police Witness List. Addendum, Exh. A. Persons present at the scene of a "crime" are presumed to be *res gestae* witnesses able to testify regarding their observations. *People v. Brooks*, 96 Mich. App. 96, 98; 292 N.W.2d 139 (1980) (per curiam). The Prosecutor also included Melody and Terry Youk as *res gestae* witnesses on Count II (delivery of a controlled substance) of the First Amended General Information (the "Information"). R., First Amended General Information. The Prosecutor even references a telephone call Terry Youk made to Dr. Kevorkian on behalf of his brother, Thomas Youk. March 25, 1999 Tr., Vol. III at 31. It is well-settled that the Prosecution is under a duty to produce all witnesses indorsed on the Information and *all res gestae witnesses*. *People v. Kaigler*, 81 Mich. App. 340, 344; 265 N.W.2d 324 (1978) (per curiam); *Szymanski*, 52 Mich. App. at 609-610. There is no question that *res gestae* witnesses must be called, and it is error not to do so. *People v. Romano*, 35 Mich. App. 135, 141; 192 N.W.2d 271 (1971). Therefore, the Prosecutor was absolutely obligated to call the Youks at least as to Count II of the Information, the delivery of a controlled substance. Because the Prosecutor contends that both Counts I and II arise from the *same act* (the injection of a controlled substance into Thomas Youk which supposedly caused his death), the same *res gestae* witnesses must necessarily be allowed to testify as to both counts. March 25, 1999 Tr., Vol. III at 19.

Indeed, the Youks were willing and able to testify to the facts and circumstances surrounding Dr. Kevorkian's interactions with Thomas Youk at and around the time of Thomas Youk's death. March 23, 1999 Tr., Vol. II at 122

(Melody Youk)[2]. Clearly their testimony would have probative value, and any doubts as to whether they were in fact *res gestae* witnesses must be resolved in favor of admitting their testimony. *Austin*, 95 Mich. App. at 674; *Doyan*, 116 Mich. App. at 363. The facts and circumstances to which the Youks could testify not only would shed light on the circumstances and context of the alleged acts, but also on Dr. Kevorkian's intent, which even the Prosecutor acknowledged must be determined "by the circumstances surrounding" what a person does. March 25, 1999 Tr., Vol. III at 28.

C. *The Youks' Testimony was Admissible for Several Other Reasons as Well.*

Aside from being *res gestae* witnesses, the Youks' testimony should have been admitted for other reasons as well. The Youks' testimony was relevant as to Thomas Youk's cause of death. Gorosh could and should have challenged the cause of death because there was evidence introduced which raised the issue, and Thomas Youk suffered from a fatal disease, the effects of which could have caused death at any time. The Youks were aware of the physical condition of Thomas Youk, and the progression of his ALS. Even the Prosecutor conceded that Thomas Youk suffered from a "terrible disease" and that he was "very sick." March 22, 1999 Tr., Vol. I at 254 (Mr. Skrzynski). As Thomas Youk's closest family members, Terry and Melody Youk were aware that Thomas Youk was near death. They knew this from

2. The record shows that the offer of Proof for Terry Youk would be the same as that offered for Melody Youk. March 25, 1999 Tr., Vol. III at 6 (Dr. Kevorkian).

personal observation of Thomas Youk, as well as direct communications with Thomas Youk's physicians and hospice caregivers. While the Prosecutor claimed there was no evidence that Thomas Youk was afraid of choking, despite Dr. Kevorkian's statements in the "60 Minutes" videotape, (People's Trial Exh. 2), Melody and Terry Youk would have testified that Thomas Youk was in fact very afraid of choking.

The Trial Court recognized that challenging the cause of death would be an appropriate defense. March 19, 1999 Tr., In Chambers Proceedings at 33 (The Court). Gorosh indicated he might challenge the cause of death, but then failed to do so, and failed to advise Dr. Kevorkian to do so, even though this is a fundamental defense strategy in a murder trial inasmuch as the requirement that the accused caused the death of the decedent is a requisite element of murder. *Id.* at 21-23 (Gorosh). The Youks' testimony as to Thomas Youk's deteriorating medical condition would have been relevant to this defense.

Furthermore, the Prosecutor argued throughout the trial that the purpose behind Dr. Kevorkian's making the videotape was for publicity and to advance his own personal agenda. March 22, 1999 Tr., Vol. I at 255 (Skrzynski); March 25, 1999 Tr., Vol. III at 29-30, 41-42, 45 (Skrzynski). The Prosecutor made numerous statements and implications about Dr. Kevorkian's motives, and his "insensitivity" to Thomas Youk. March 25, 1999 Tr., Vol. III at 25-26, 29-32, 34-39, 41, 45, 63-65. Melody and Terry Youk would have contradicted this, and testified to Dr. Kevorkian's sensitivity, and that his actual purpose in making the videotape was to show the consent of Thomas Youk to receive the treatment of Dr. Kevorkian as protection from possible prosecution.

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The Prosecution also argued lack of consent, although Dr. Kevorkian was precluded from introducing any evidence as to Thomas Youk's consent. March 25, 1999 Tr., Vol. III at 26, 29-30 (Skrzynski). The Prosecution stated that Thomas Youk was a victim sought out by Dr. Kevorkian, and that Dr. Kevorkian arrived like a "medical hit man." *Id.* at 64-65. Melody and Terry Youk would have testified that Thomas Youk was not a victim, and in fact it was Thomas Youk who sought out Dr. Kevorkian, in an effort to alleviate his pain and suffering. March 23, 1999 Tr., Vol. II at 122 (Melody Youk). Based upon the Youks' conversations with both Thomas Youk and Dr. Kevorkian, the Youks could have testified to the states of mind of both Thomas Youk and Dr. Kevorkian in order to rebut the Prosecutor's charges that Thomas Youk was a victim. March 25, 1999 Tr., Vol. III at 64-65 (Skrzynski). Such testimony was admissible as an exception to the hearsay rule as a then-existing mental, emotional, or physical condition under MRE 803(3). Dr. Kevorkian was precluded from presenting this evidence in his defense, while the Prosecutor was permitted to raise these issues without contradiction.

In fact, Melody Youk should have been allowed to testify as to the contents of any conversation she heard between Thomas Youk and Dr. Kevorkian. March 23, 1999 Tr., Vol. II at 122 (Melody Youk). It is elementary that such conversations are exceptions to the hearsay rule as statements made for the purposes of obtaining medical treatment or diagnosis. MRE 803(4). Melody Youk explicitly stated in her offer of proof that she, Thomas Youk and Dr. Kevorkian discussed what services Dr. Kevorkian could render for Thomas Youk *as a physician*. March 23, 1999 Tr., Vol. II at 122. Likewise,

any comment Thomas Youk made in Melody Youk's presence about his physical condition is admissible under this same rule. MRE 803(3). In fact, any statement made by Thomas Youk is also admissible as an exception to the hearsay rule as a statement under belief of impending death, inasmuch as Thomas Youk was suffering from the final stages of a fatal disease. MRE 804(b)(2); March 23, 1999 Tr., Vol. II at 75-78, 90-91 (Dr. Dragovic). Such a statement is admissible in a homicide prosecution, and Thomas Youk believed his death was imminent. *Id.*

In addition, Melody Youk could have rebutted numerous statements made by the Prosecution. For instance, the Prosecution claimed Dr. Kevorkian brought "a pretty large piece of equipment." March 25, 1999 Tr., Vol. III at 31 (Skrzynski). Melody Youk saw this piece of equipment firsthand. The Prosecution implied some sinister purpose behind the fact that Dr. Kevorkian turned off the videotape, stating, "[Dr. Kevorkian] turns off the videotape . . . and we don't know . . . what Dr. Kevorkian is doing in the meantime." *Id.* at 32-33. Melody Youk could have explained the reasons Dr. Kevorkian turned off the videotape, and what did go on in the meantime. The Prosecution claimed that Thomas Youk gasped and attempted to say something after Dr. Kevorkian administered the sedative. *Id.* at 63. The Prosecution suggested that Thomas Youk said "Wait." *Id.* However, it is just as likely that this sound was common for Thomas Youk due to his illness, or that it represented Thomas Youk's death throes *from ALS* and had nothing to do with Dr. Kevorkian's actions. Melody Youk would have shed light on these issues.

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V. NUMEROUS OTHER CLEAR ERRORS OCCURRED DURING THE TRIAL WHICH PREJUDICED DR. KEVORKIAN AND THEREFORE REQUIRE REVERSAL UNDER THE PLAIN ERROR DOCTRINE.

A. *Standard of Review for Plain Error.*

The Michigan Supreme Court has held that it will reverse when plain errors have resulted in the conviction of an innocent defendant, have prejudiced the defendant, or have affected the fairness, integrity, or public reputation of judicial proceedings independent of the defendant's innocence. *People v. Carines*, 460 Mich. 750, ___; 597 N.W.2d 130, 138 (1999) (citation omitted). Reversal is required where: (1) the error occurred; (2) the error was clear or obvious; and (3) the plain error affected substantial rights. *United States v. Olano*, 507 U.S. 725 (1993).

B. *Plain Errors Affected Substantial Rights of Dr. Kevorkian.*

As shown below, numerous clear and obvious errors occurred during the trial which affected Dr. Kevorkian's right to a fair trial.

First, the Prosecutor impermissibly made mention of possible penalty in his closing argument by indicating that Michigan does not have the death penalty. March 25, 1999 Tr., Vol. III at 45-46 (Skrzynski). *Id.* The general rule is that counsel should not address the question of disposition

upon conviction. *People v. Turner*, 99 Mich. App. 733, 742; 298 N.W.2d 848 (1980), *citing*, *People v. Szczytko*, 390 Mich. 278, 285; 212 N.W.2d 211 (1973).

Second, the Prosecutor repeatedly asked impermissible leading questions of witnesses during direct examination of witnesses in violation of MRE 611(C)(1). *See, e.g.*, March 23, 1999 Tr., Vol. II at 77 ("Dr. Pacris did that, didn't he?"), 78 ("Now you amended the death certificate again, did you not, after the examination on the brain and the spinal cord?"), 79 ("Could he have died earlier than the day before?") (Skrzynski).

Third, the Trial Court should have requested that Gorosh cease his disrespectful behavior in the Court Room. Gorosh was visibly rolling his eyes and putting his head in his hands, and audibly sighing and making comments under his breath during Dr. Kevorkian's presentation. R., New Tr. Br., Exh. A at 4, Exh. C at 4.

Finally, the Prosecutor impermissibly compared Dr. Kevorkian's act of easing the pain and suffering of Thomas Youk resulting from a fatal disease to a mother seeking to kill her Down's Syndrome child, and a teenage girl contemplating suicide because of trouble with her boyfriend. March 25, 1999 Tr., Vol. III at 65-66 (Skrzynski). The Prosecutor further impermissibly commented about making euthanasia a State policy, and asserted that eleven million people in Europe have died as a result of such a policy. *Id.* at 66-67. A prosecutor "may not intentionally inject inflammatory arguments with no apparent justification except to arouse prejudice." *People v. Lee*, 212 Mich. App. 228,

247; 537 N.W.2d 233 (1995), *citing*, *People v. Bahoda*, 448 Mich. 261, 266; 531 N.W.2d 659 (1995). Parties are entitled to a fair trial on the merits, "uninfluenced by appeals to passion or prejudice." *Board of County Rd. Comm'rs v. GLS LeasCo, Inc.*, 394 Mich. 126, 131; 299 N.W.2d 797 (1975) (citation omitted). The Prosecutor's comments were highly prejudicial, irrelevant, without support in the record, and introduced solely to inflame the passions of the jurors.

CONCLUSION AND RELIEF SOUGHT

For all the foregoing reasons, Dr. Kevorkian, respectfully requests this Honorable Court to: (1) dismiss the charges against Dr. Kevorkian in their entirety based on the Constitutional issues herein raised by Dr. Kevorkian; (2) vacate the verdict and Judgment of Sentence and remand to the Trial Court based upon the errors in the trial proceedings that deprived Dr. Kevorkian of a full and fair trial; and/or (3) reverse the Trial Court's Opinion and Order denying Dr. Kevorkian's motion for a new trial, and remand to the Trial Court for a new trial or further proceedings pursuant to MCR 6.431 in the interest of avoiding a clear miscarriage of justice.

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Respectfully submitted,

MORGANROTH & MORGANROTH

By: s/ Mayer Morganroth
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JEFFREY B. MORGANROTH (P41670)
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Southfield, Michigan 48075
(248) 355-3084

Dated: November 12, 1999

Appendix G

EXHIBIT A

PERSON/WITNESS LIST

WATERFORD POLICE
2303 Crescent Lake Road
Waterford, MI 48329-3775 (248) 674-0351 Fax (248) 673-5190

PERSON / WITNESS LIST

Venue 63-[illegible] ORI MI6380300

P.O. #_____ PAGE OF

DATE REPORTED	DATE(S) OCCURRED	TIME(S) OCCURRED	DAY	DISPOSITION	YEAR	INCIDENT NUMBER
09/18/98	09/18/98				98	35952

PERSON CODES: (1) Reported By (2) Owner (3) Victim (4) Interviewed (8) Witness (9) Secured By

LOCAL USE

RACE CODES: (A) Asian (B) Black (I) Native American (W) White (U) Unknown

ETHNICITY: (A) Arab (H) Hispanic (O) Other (U) Unknown

WITNESS TYPE: (O.C.) O.I.C. (OF) Police Officer (VC) Victim (VR) Victim Relative (RP) Reporting Person (EY) Eyewitness (MD) Medical (EX) Expert (RG) Res Gestae (MS) Misc.

PE	SEQ	CODE	W-TYPE	PERSON'S NAME (LAST, FIRST, MIDDLE, SUFFIX) OR WARRANT AGENCY	ALAIS / MAIDEN NAME
		8	MS	YOUK, MELODY	

ADDRESS: 1388 NOKOMIS CITY: WATERFORD STATE: MI ZIP: 48328

SERVICE BY: MAIL ☐ PD ☐

SOCIAL SECURITY #	STATE DRIVERS LICENSE #	HOME PHONE	DAY/WORK PHONE	PAGER / FAX / VOICE MAIL
		681-2087		

RACE	SEX	ETH	AGE	DOB	HEIGHT	WEIGHT	EYES	HAIR	LENGTH	STYLE	BUILD	SCARS / MARKS / TATOOS
W	F	U	52	3/24/46								

TESTIMONY OR WARRANT ARREST INFORMATION (Warrant Type, Charge, OCA / Warrant #, Bond, Person Confirming)
VICTIM'S WIFE

CONNECTED TO INCIDENT # 1, 2 OR 3: 1

INJURY (Check 1): ☒ None ☐ Fatal ☐ Bone Fracture ☐ Internal ☐ Laceration ☐ Minor ☐ Major ☐ Loss of Teeth ☐ Unconcious

VICTIM OFFENDER RELATIONSHIP (List Victim's Relationship to ARRESTEE ie: Spouse, Lover's Child, Sibling, Stranger, In-law, Employer, etc.)

PE	SEQ	CODE	W-TYPE	PERSON'S NAME (LAST, FIRST, MIDDLE, SUFFIX) OR WARRANT AGENCY	ALAIS / MAIDEN NAME
		8	MS	YOUK, TERRENCE ALAN	

ADDRESS: Po Box 663 CITY: Woodstock STATE: Vermont ZIP: 05091

SERVICE BY: MAIL ☐ PD ☐

SOCIAL SECURITY #	STATE DRIVERS LICENSE #	HOME PHONE	DAY/WORK PHONE	PAGER / FAX / VOICE MAIL
		(802) 457-4446		

RACE	SEX	ETH	AGE	DOB	HEIGHT	WEIGHT	EYES	HAIR	LENGTH	STYLE	BUILD	SCARS / MARKS / TATOOS
W	M	U	43	09-28-54	5'10							

TESTIMONY OR WARRANT ARREST INFORMATION (Warrant Type, Charge, OCA / Warrant #, Bond, Person Confirming)
VICTIM'S BROTHER

CONNECTED TO INCIDENT # 1, 2 OR 3: 1

INJURY (Check 1): ☒ None ☐ Fatal ☐ Bone Fracture ☐ Internal ☐ Laceration ☐ Minor ☐ Major ☐ Loss of Teeth ☐ Unconcious

VICTIM OFFENDER RELATIONSHIP (List Victim's Relationship to ARRESTEE ie: Spouse, Lover's Child, Sibling, Stranger, In-law, Employer, etc.)

PE	SEQ	CODE	W-TYPE	PERSON'S NAME (LAST, FIRST, MIDDLE, SUFFIX) OR WARRANT AGENCY	ALAIS / MAIDEN NAME
		8	MS	WALLACE, MIKE (CBS)	

ADDRESS: C/O WTPD CITY: STATE: ZIP:

SERVICE BY: MAIL ☐ PD ☐

SOCIAL SECURITY #	STATE DRIVERS LICENSE #	HOME PHONE	DAY/WORK PHONE	PAGER / FAX / VOICE MAIL

RACE	SEX	ETH	AGE	DOB	HEIGHT	WEIGHT	EYES	HAIR	LENGTH	STYLE	BUILD	SCARS / MARKS / TATOOS

TESTIMONY OR WARRANT ARREST INFORMATION (Warrant Type, Charge, OCA / Warrant #, Bond, Person Confirming)

CONNECTED TO INCIDENT # 1, 2 OR 3: 1

INJURY (Check 1): ☒ None ☐ Fatal ☐ Bone Fracture ☐ Internal ☐ Laceration ☐ Minor ☐ Major ☐ Loss of Teeth ☐ Unconcious

VICTIM OFFENDER RELATIONSHIP (List Victim's Relationship to ARRESTEE ie: Spouse, Lover's Child, Sibling, Stranger, In-law, Employer, etc.)

PE	SEQ	CODE	W-TYPE	PERSON'S NAME (LAST, FIRST, MIDDLE, SUFFIX) OR WARRANT AGENCY	ALAIS / MAIDEN NAME
		8	MS	REP CBS 60 MINUTES, KEEPER OF RECORDS	

ADDRESS: C/O WTPD CITY: STATE: ZIP:

SERVICE BY: MAIL ☐ PD ☐

SOCIAL SECURITY #	STATE DRIVERS LICENSE #	HOME PHONE	DAY/WORK PHONE	PAGER / FAX / VOICE MAIL

RACE	SEX	ETH	AGE	DOB	HEIGHT	WEIGHT	EYES	HAIR	LENGTH	STYLE	BUILD	SCARS / MARKS / TATOOS

TESTIMONY OR WARRANT ARREST INFORMATION (Warrant Type, Charge, OCA / Warrant #, Bond, Person Confirming)
RE: VIDEO TAPES FROM 11/22/98 BROADCAST

CONNECTED TO INCIDENT # 1, 2 OR 3:

INJURY (Check 1): ☐ None ☐ Fatal ☐ Bone Fracture ☐ Internal ☐ Laceration ☐ Minor ☐ Major ☐ Loss of Teeth ☐ Unconcious

VICTIM OFFENDER RELATIONSHIP (List Victim's Relationship to ARRESTEE ie: Spouse, Lover's Child, Sibling, Stranger, In-law, Employer, etc.)

INVESTIGATING OFFICER (S)	BADGE NUMBER(S)	REVIEWED BY	ASSIGNED TO	ATTENTION TO:
SGT MOSTEK	14			

Form # 103

W.T.P.D. REV. 8/97

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Appendix G

EXHIBIT B

Rule 611. Mode and Order of Interrogation and Presentation

Rule 611 reads as follows:

(a) Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) Scope of cross-examination. A witness may be cross-examined on any matter relevant to any issue in the case, including credibility. The judge may limit cross-examination with respect to matters not testified to on direct examination.

(c) Leading questions.

(1) Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony.

(2) Ordinarily leading questions should be permitted on cross-examination.

(3) When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions. It is not necessary to declare

the intent to ask leading questions before the questioning begins or before the questioning moves beyond preliminary inquiries.

[Amended October 1, 1991.]

* * * *

Appendix G

EXHIBIT C

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

Rule 803 reads as follows:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) *Present sense impression.* A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) *Excited utterance.* A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) *Then existing mental, emotional, or physical condition.* A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) *Statements made for purposes of medical treatment or medical diagnosis in connection with treatment.* Statements made for purposes of medical treatment or medical diagnosis in connection with treatment and describing medical history, or past or present symptoms, pain,

or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably necessary to such diagnosis and treatment.

(5) *Recorded recollection.* A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) *Records of regularly conducted activity.* A memorandum, report, record, or data compilation, in any form, of acts, transactions, occurrences, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as

(7) *Absence of entry in records kept in accordance with the provisions of paragraph (6).* Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) *Public records and reports.* Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, and subject to the limitations of MCLA 257.624; MSA 9.2324.

(9) *Records* of *vital statistics.* Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) *Absence* of *public record or entry.* To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) *Records* of *religious organizations.* Statements of births, marriages, divorces, death, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

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(12) *Marriage, baptismal, and similar certificates.* Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a member of the clergy, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) *Family records.* Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) *Records of documents affecting an interest in property.* The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

(15) *Statements in documents affecting an interest in property.* A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) *Statements in ancient documents.* Statements in a document in existence twenty years or more the authenticity of which is established.

(17) *Market reports, commercial publications.* Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) *Deposition testimony of an expert.* Testimony given as a witness in a deposition taken in compliance with law in the course of the same proceeding if the court finds that the deponent is an expert witness and if the deponent is not a party to the proceeding.

(19) *Reputation concerning personal or family history.* Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history.

(20) *Reputation concerning boundaries or general history.* Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located.

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(21) *Reputation as to character.* Reputation of a person's character among associates or in the community.

(22) *Judgment of previous conviction.* Evidence of a final judgment, entered after a trial or upon a plea of guilty (or upon a plea of nolo contendere if evidence of the plea is not excluded by MRE 410), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the state in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(23) *Judgment as to personal, family, or general history, or boundaries.* Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

(24) *Othor exceptions. A* statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact, (B) the statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts, and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of the

statement makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

[Amended effective March 1, 1991, October 1, 1991, June 1, 1995, April 1, 1996.]

* * * *

Appendix G

EXHIBIT D

Rule 804. Hearsay Exceptions; Declarant Unavailable

Rule 804 reads as follows:

(a) Definition of unavailability. "Unavailability as a witness" includes situations in which the declarant —

(1) is exempted by ruling of the court on the grounds of privilege from testifying concerning the subject matter of the declarant's statement; or

(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or

(3) has a lack of memory of the subject matter of the declarant's statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means, and in a criminal case, due diligence is shown.

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A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) *Former testimony.* Testimony given as a witness at another hearing of the same or a different proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(2) *Statement under belief of impending death.* In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.

(3) *Statement against interest. A* statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement lending to expose the declarant to criminal liability and offered to

exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) *Statement of personal or family history.*

(A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or

(B) A statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) *Deposition testimony.* Testimony given as a witness in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

For purposes of this subsection only, "unavailability of a witness" also includes situations in which:

(A) The witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or

(B) On motion and notice, such exceptional circumstances exist as to make it desirable, in the interests of justice, and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

(6) *Other exceptions. A* statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact, (B) the statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts, and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of the statement makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

Amended effective December 1, 1989, June 1, 1995, April 1, 1996.]

* * * *

APPENDIX H — DEFENDANT'S REPLY BRIEF IN FURTHER SUPPORT OF MOTION FOR A NEW TRIAL DATED JUNE 2, 1999

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

Case No. 1998-163675-FC
Hon. Jessica Cooper

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

vs.

JACK KEVORKIAN,

Defendant.

* * *

DEFENDANT'S REPLY BRIEF IN FURTHER SUPPORT OF MOTION FOR A NEW TRIAL

ARGUMENT

I. THE PEOPLE'S CONTENTION THAT GOROSH DID NOT SERVE AS AN ATTORNEY FOR DR. KEVORKIAN IS BASELESS.

The People first claim in its brief in opposition (the "Brief") that Dr. Kevorkian represented himself, and therefore he may not maintain a claim of ineffective assistance of counsel. However, as shown below, this contention utterly misses the mark.

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Not only do the unrebutted affidavits submitted by co-counsel, Lisa Dwyer, Esq. ("Dwyer") and defense team jury consultant, Ruth Holmes, CDE ("Holmes"), clearly establish that David Gorosh, Esq. ("Gorosh") served as lead trial counsel for Dr. Kevorkian in connection with the instant action from the inception through sentencing, but the People's own Brief acknowledges such representation by Gorosh as well. For instance, the People acknowledge that Gorosh argued pre-trial motions and submitted motions and responses during trial on behalf of Dr. Kevorkian. People's Brief at 2, 15. In addition, the People attach the limited appearance (People's Exhibit C) for purposes of the arraignment filed by Gorosh and Dwyer on behalf of Dr. Kevorkian on December 16, 1998, as well as the February 26, 1999 *general notice of appearance* (People's Exhibit D) filed by Gorosh and Dwyer on behalf of Dr. Kevorkian in this action. Tellingly, the general appearance was filed before hearings were conducted on numerous pre-trial motions that Gorosh in fact argued on behalf of Dr. Kevorkian, and no notice of withdrawal was ever filed by Gorosh or Dwyer. Indeed, the People even go so far as to state that Dr. Kevorkian's defense team appeared cohesive and Gorosh appeared to be acting as a responsible attorney throughout the trial proceedings. People's Brief at 2, 15.

Even without the acknowledgments made by the People in their Brief, the unrebutted affidavits submitted by Dwyer and Holmes are more than sufficient to establish that Dr. Kevorkian was relying upon Gorosh as his lead advisor and/or advocate in connection with his defense of the instant action at all times from inception through sentencing. These affidavits unequivocally confirm that Dr. Kevorkian needed

and wanted assistance in the form of advocacy and advice from Gorosh throughout all phases of the proceedings. In fact, these affidavits further establish that Dr. Kevorkian advised Gorosh and Dwyer that they would be presenting the defense to the jury as advocates until Gorosh breached Dr. Kevorkian's trust. Although Dr. Kevorkian took over the role of presenting the defense to the jury due to Gorosh's inappropriate conduct, it is equally clear from the unrebutted affidavits of Dwyer and Holmes that Dr. Kevorkian still requested and needed Gorosh and Dwyer to serve as his legal advisors throughout the trial. In this regard, Gorosh and Dwyer sat at counsel table throughout the trial proceedings, and were expected to provide assistance to Dr. Kevorkian with respect to all aspects of his defense.

II. THE PEOPLE ARE UNABLE TO REBUT THE AFFIDAVITS THAT ESTABLISH THE INEFFECTIVE ASSISTANCE OF GOROSH.

The People also seem to suggest that Gorosh did not appear to render ineffective assistance to Dr. Kevorkian. However, the People could not even attempt to rebut virtually any of the improprieties and errors committed by Gorosh inasmuch as the People lack personal knowledge regarding such occurrences.

For instance, Defendant's initial brief ("the Initial Brief") contends that Gorosh was not qualified to handle this case essentially alone as lead trial counsel based upon the affidavit submitted by Michael Alan Schwartz ("Schwartz"), former employer and mentor to Gorosh, and the affidavit of Dwyer. Unable to address these affidavits, the People simply argue

that Gorosh's repeated mispronunciation of the term "gastro-enterologist" during the preliminary examination is insufficient to establish his ineffective assistance. The unrebutted affidavit submitted by Schwartz, however, makes clear that Gorosh was "ill-equipped to serve as chief defense counsel in a significant murder case given his lack of experience, his inability to grasp important strategic considerations, and his ultimate failure to consider the best interests of his client." Exhibit B to Defendant's Initial Brief at Para. 23. Moreover, the unrebutted affidavit submitted by Dwyer establishes that despite the inexperience of Gorosh, he exercised complete and unyielding control over all aspects of the defense, shut her out, ignored her input, refused to consult with her, withheld information from her, alienated members of the defense team, spent the bulk of his time talking to the media instead of preparing a defense for trial, ignored the input of Dr. Kevorkian and failed to consult with and advise Dr. Kevorkian in preparation for and during trial. Exhibit A to Defendant's Initial Brief.

In addition, the People also are unable to rebut the affidavits of Dwyer and Holmes that clearly establish that it was Dr. Kevorkian's desire for Gorosh and Dwyer to present the defense to the jury at trial once the Court indicated that a hybrid defense would not be permitted. Nevertheless, the unrebutted affidavits establish that Gorosh spent the bulk of his time talking to the media and arguing with a young attorney who was not even an approved member of the defense team instead of preparing a defense for trial. The affidavits of Dwyer and Holmes further make clear that Gorosh's open defiance of Dr. Kevorkian's repeated instructions that a certain young attorney was not to be a

member of the defense team led to additional disharmony and fights, and further delayed trial preparation. Although the affidavit of Dwyer further reveals that Dr. Kevorkian thereafter wanted her to present the defense to the jury as a result of his loss of trust in Gorosh, the statements and interviews provided by members of the defense team further establish that Gorosh appallingly coerced Dwyer to refuse the request by threatening harm to her reputation if she accepted.

Furthermore, the People also are unable to rebut the affidavits of Dwyer and Holmes that unequivocally reveal that after Dr. Kevorkian indicated that he would present the defense to the jury with the assistance of Gorosh and Dwyer as advisors, Gorosh engaged in conduct designed to undermine Dr. Kevorkian for the purpose of causing Dr. Kevorkian to feel so helpless in presenting his defense that he would turn over the trial to Gorosh. In this regard, the unrebutted affidavits of Dwyer and Holmes state that Gorosh did not provide assistance to Dr. Kevorkian during the trial, withheld consultation and advice, spent his time talking to media and friends instead of helping prepare a defense and displayed contempt and ridicule for Dr. Kevorkian while he was actually presenting his case to the jury, including making inappropriate gestures, facial expressions and noises. Exhibits A and C to Initial Brief.

In fact, as further evidence of Gorosh's complete failure to provide adequate assistance as an advocate and/or advisor, Dr. Kevorkian submits his written statement executed on May 29, 1999, which is attached hereto as Exhibit A. The written statement of Dr. Kevorkian unequivocally confirms that

although Dr. Kevorkian was relying upon Gorosh as his lead trial counsel, Gorosh: (1) never reported to Dr. Kevorkian regarding any request for assistance that he asked of Gorosh; (2) never prepared a witness list; (3) never coached or advised Dr. Kevorkian regarding questioning of witnesses or procedures regarding objections; (4) rarely returned Dr. Kevorkian's telephone calls; (5) did not consult with Dr. Kevorkian regarding media appearances; and (6) disregarded Dr. Kevorkian's directions to cease media appearances, to move from the chair next to him during the trial in order to allow Dr. Kevorkian to consult with Dwyer, and to refrain from filing the motion to quash the criminal assistance to suicide count, among other things. Exhibit A.

III. DR. KEVORKIAN WAS PREJUDICED BY THE IMPROPRIETIES AND ERRORS OF GOROSH.

The People erroneously contend that a new trial is not warranted because Dr. Kevorkian purportedly has not been prejudiced by virtue of the improprieties and errors committed by Gorosh. As shown below, the People's position is misplaced.

While the People seem to suggest that there is no certainty of prejudice, Dr. Kevorkian need not show this. There is prejudice to the defendant if there is a *reasonable probability* that, absent the errors, the finder of fact would have had reasonable doubt respecting guilt. *People v. Pickens*, 446 Mich 298, 312; 521 NW2d 797 (1994). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* at 314. Clearly here, had Gorosh acted as an effective advocate and advisor, properly planning trial

strategy and a defense, providing advice and consultation to Dr. Kevorkian, interposing timely objections to aid Dr. Kevorkian, properly preparing the legal bases for the Court to receive the testimony of the Youks, and refraining from making inappropriate gestures and facial expressions during Dr. Kevorkian's presentation at trial, there would have been a reasonable probability that the result of the trial would have been different, especially in light of the results of Dr. Kevorkian's previous similar trials.

First, Gorosh's performance as an advocate was wholly inadequate. As an advocate, "a lawyer zealously asserts the client's position under the rules of the adversary system." MRPC 1.0, *comment*. As established by the unrebutted affidavits of Dwyer and Holmes, as well as the written statement of Dr. Kevorkian, Gorosh did not prepare any defense for his client, nor aid or coach Dr. Kevorkian at trial. The affidavit of Dwyer makes clear that Dr. Kevorkian was left alone without any defense because Gorosh did not prepare any defense. Gorosh was more interested in serving his own ego by talking to the media than in doing the difficult legal work necessary to present a competent defense. The affidavits of Dwyer and Holmes further confirm that Gorosh prepared no legal support to allow Dr. Kevorkian to call witnesses, and thus none were called. Dr. Kevorkian does not have legal training, and realized the need for legal advice. However, since Gorosh refused to provide this advice, Dr. Kevorkian was left at the mercy of the Prosecutor's superior knowledge of trial tactics and procedures. While the Prosecutor points out that Dr. Kevorkian has been involved in previous trials, this hardly qualifies him as an attorney, and is a poor substitute for the rigorous legal training required of any member of the State Bar of Michigan.

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Additionally, as the affidavit of Dwyer points out, Gorosh did not object to improper comments by the Prosecutor, although he was present at trial, and prompted to do so by co-counsel, Dwyer. Gorosh sat idly by as these inappropriate comments were made in the presence of the jury, knowing full well that Dr. Kevorkian did not have the legal training and understanding to make these objections on his own.

Second, the unrebutted affidavits of Dwyer and Holmes, as well as the written statement of Dr. Kevorkian, establish that Gorosh provided no substantive advice to his client. As an advisor, "a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications." MRPC 1.0, *comment*. The affidavits of Dwyer and Holmes reveal that Gorosh became angered when Dr. Kevorkian decided to present his own case at trial, due to his conflicts with Gorosh. While Gorosh stayed on as advisor, and Dr. Kevorkian requested and desired his advice and aid, Gorosh purposely withheld such advice and assistance as confirmed by the affidavits of Dwyer and Holmes. Gorosh had a duty to provide advice to his client. *Id.* Appallingly, the affidavits of Dwyer and Holmes make clear that Gorosh not only refused to aid his client, but he did everything in his power to make certain that Dr. Kevorkian's defense would fail in order to force Dr. Kevorkian to turn over the trial to him. In addition to withholding advice from Dr. Kevorkian, Gorosh prevented Dr. Kevorkian from obtaining legal advice elsewhere. He refused to step aside as counsel, he persisted in bringing on young attorneys whom Dr. Kevorkian did not approve, and he physically prevented Dr. Kevorkian from sitting next to Dwyer at trial, thereby preventing him from receiving

advice from Dwyer. In fact, Gorosh even undermined Dr. Kevorkian in front of the Judge and jury by making inappropriate gestures, facial expressions and noises while Dr. Kevorkian was presenting his defense to the jury. While the People blithely dismiss Gorosh's behavior, the support and confidence of trial counsel is critical to a defendant's jury presentation and his credibility with the Court.

Third, Dr. Kevorkian did not call any witnesses. He was not permitted to call the Youks because Gorosh did not prepare any legal support for allowing their testimony as revealed by the affidavits of Dwyer and Holmes, and the written statement of Dr. Kevorkian. These witnesses would have been crucial to Dr. Kevorkian's defense. Their testimony would have been revealing as to the facts and circumstances surrounding the death of Thomas Youk, and may very well have changed the minds of some jurors. Indeed, this is the very reason the Prosecution did not want this evidence presented. Without proper legal guidance, Dr. Kevorkian was unable to counter the Prosecution arguments, and was left without any hopes of presenting his best defense, as well as witnesses to support his position.

Fourth, Gorosh's pre-trial strategy was defective as revealed by the affidavits of Dwyer, Holmes and Schwartz. While the People dismiss Gorosh's pursuit of the ill-advised motion to quash the assisted suicide count despite warnings from Dwyer, Dr. Kevorkian, Schwartz and Fieger, as well as his striking of the public policy arguments from the motion to quash the murder count as mere trial strategy, it was more than this. People's Brief at 7. The acts constitute a serious error, and an indication that Gorosh did not understand

fundamental legal arguments and strategies, even when they were explained to him. They illustrate the fact that Gorosh was not performing as well as a lawyer with ordinary skill in the criminal law, as is required for the effective assistance of counsel guaranteed by the Sixth Amendment. *People v. Garcia*, 398 Mich 250, 264; 247 NW2d 547 (1976). Gorosh was simply not qualified to handle a case of this magnitude as the unrebutted affidavit of Schwartz establishes, and, as a result, Dr. Kevorkian has lost his liberty.

Finally, Dr. Kevorkian was clearly prejudiced by all of these actions because he was ultimately convicted. While the People prefer to view the incidents of ineffective assistance that they choose to address in isolation, and therefore conclude that none in and of themselves are prejudicial, it is clear that as the errors of counsel mounted, so did the prejudice to Dr. Kevorkian. It is likewise little consultation to Dr. Kevorkian that the People agree that the motion to quash the murder charge was "ridiculous." People's Brief at 7-8. Indeed, nothing makes a stronger case for ineffective assistance of counsel than the support of the opposition for all of trial counsel's decisions. The fact that the Prosecutor agrees with Gorosh's decisions that worked to their benefit hardly indicates that there was no prejudice to Dr. Kevorkian.

Furthermore, it is disingenuous for the Prosecutor to suggest that certain of the deficiencies did not prejudice Dr. Kevorkian when Dr. Kevorkian was left to present no defense, and was ultimately convicted. Dr. Kevorkian need only show there is a reasonable probability that the result would have been different had he received adequate assistance. In fact, the People acknowledge in their Brief

that a defendant is entitled to a new trial where he is deprived of control over his own defense. People's Brief at 4. The unrebutted affidavits of Dwyer, Holmes and Schwartz, as well as the written statement of Dr. Kevorkian, conclusively establish that Gorosh exercised unyielding control over all aspects of the defense, and openly defied Dr. Kevorkian's wishes as well as refusing to consult, advise and provide information to Dr. Kevorkian and co-counsel. Based on the improprieties and substantial errors committed by Gorosh, there is a reasonable probability that the outcome would have been different if handled by qualified counsel.

There is no more clear evidence of the prejudice Dr. Kevorkian suffered than his conviction. Indeed, while the Prosecutor suggests they had an iron clad case and there was no defense, this is a view taken with the benefit of 20/20 hindsight. Indeed, in the article the People submitted as an exhibit, the Prosecutor was not even sure whether to pursue this case. People's Exhibit A. It is disingenuous to suggest the Prosecutor would even consider not pursuing a case if he felt that a conviction was certain. The case only became a certain conviction for the Prosecution when Dr. Kevorkian did not receive any competent legal advice or advocacy. It then became an easy victory for the Prosecution at the expense of the Constitutional rights of Dr. Kevorkian.

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IV. IN THE EVENT THAT THE UNREBUTTED AFFIDAVITS ARE INSUFFICIENT IN AND OF THEMSELVES TO WARRANT A NEW TRIAL THEN AN EVIDENTIARY HEARING SHOULD BE CONDUCTED.

The People disingenuously suggest that anything not directly stated in the affidavits should not be given any weight. This position is most curious inasmuch as the People only rely upon unsubstantiated newspaper articles without submitting any affidavits whatsoever. Tellingly, the People also neglect to mention that Dr. Kevorkian's Initial Brief specifically states that it is directly based upon detailed information received during telephone discussions and interviews from Dwyer, Holmes and Schwartz, and that only examples of such detailed information and facts have been set forth in the sworn affidavits for illustrative purposes. The People further fail to mention that Dr. Kevorkian's Initial Brief indicates that all of the witnesses referenced are prepared to fully testify to all of the statements and facts set forth in the Initial Brief, the examples set forth in the affidavits as well as further relevant facts during an evidentiary hearing in the event that this Court determines that the affidavits in and of themselves are insufficient to warrant a new trial. At the very least, Dr. Kevorkian is entitled to thoroughly develop a record at a *Ginther* hearing in order to support his motion. *See*, *People v. Ginther*, 390 Mich. 436; 212 N.W.2d 922 (1973). Furthermore, a motion for a new trial or an evidentiary hearing is generally a prerequisite for appellate review. *People v. Stubli*, 163 Mich App 376, 379; 413 NW2d 804 (1987). In fact, where such a record has not been established, the Court of Appeals has remanded cases

for further proceedings, noting the Court's remand was "not to require merely a *pro forma* motion in the trial court before this Court considered defendant's claims, but rather was to allow a *full evidentiary hearing so that support for or against defendant's claim of ineffective assistance of counsel could be established.*" *People v. Armstrong*, 124 Mich App 766, 770; 335 NW2d 687 (1983) (emphasis added).

Therefore, Dr. Kevorkian renews his request for an evidentiary hearing in the event that the facts set forth in the Initial Brief, affidavits and written statement are insufficient to warrant a new trial in and of themselves.

CONCLUSION

For all the foregoing reasons and all of the reasons set forth in Defendant's Initial Brief, Dr. Kevorkian respectfully requests this Honorable Court to grant a new trial pursuant to MCR 6.431 in the interest of avoiding a clear miscarriage of justice, or, in the alternative, to grant an evidentiary hearing to determine whether a new trial is appropriate and to preserve these issues for possible appeal, if necessary.

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Respectfully submitted,

MORGANROTH & MORGANROTH

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Dated: June 2, 1999

Appendix H

EXHIBIT A

AFFIDAVIT OF JACK KEVORKIAN, M.D.

David Gorosh never did or reported to me about any task I requested of him, either at all, or in time-despite often repeated requests on my part. This was the beginning of my lack of trust and confidence.

— He never prepared to show me a complete witness list.

— He never informed me about planned media appearances, and never contacted about them, despite my order to stop talking to the media.

— He never coached me regarding questioning of witnesses or procedures of objection, even though the prosecutors' outlandish claims and arguments infuriated me.

— He persisted in inviting on his own, young and inexperienced attorneys I neither requested nor wanted, — persisted despite my *vociferous* demand.

— He rarely returned my phone inquiries, and *never* on time.

— He *furtively* (for me) argued to drop the charge of assisting suicide, despite my repeated (at least a dozen times) and *equally vociferous* wish to retain it.

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— He insisted on sitting between Lisa Dwyer and me, despite my wish to often consult with Lisa; and I refrained from reprimanding his insolent behavior for fear of compromising the appearance unity in open court.

By mid-trial I was convinced that Gorosh was incapable of adequate counsel. Near the end I was shocked at how unscrupulous he is: immediately before Melody York was to take the stand, Gorosh suggested that she lie and say that on the night of Thomas Youk's death, she (Melody) expected him to be alive when she returned home. I said, "never, — nobody lies!" He never mentioned it again.

Jack Kevorkian, M.D.
29 May 1999

Witness:

s/ Ruth Holmes
RUTH HOLMES

Date: 5/29/99

APPENDIX I — DEFENDANT'S BRIEF IN SUPPORT OF MOTION FOR A NEW TRIAL DATED MAY 21, 1999

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

Case No. 1998-163675-FC
Hon. Jessica Cooper

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

vs.

JACK KEVORKIAN,

Defendant.

* * *

DEFENDANT'S BRIEF IN SUPPORT OF MOTION FOR A NEW TRIAL

PRELIMINARY STATEMENT

Dr. Jack Kevorkian ("Dr. Kevorkian") retained David Gorosh ("Gorosh") as his lead defense trial counsel in connection with the instant action prior to the airing of the "60 Minutes" video. Lisa Dwyer, Esq. ("Dwyer") was brought in for assistance as co-counsel shortly thereafter. By virtue

of Gorosh's conduct, Dr. Kevorkian was deprived of effective assistance of counsel in violation of his Constitutional rights and Michigan common law. This motion is directly based upon detailed information received during telephone discussions and interviews from Dwyer, Dr. Kevorkian's jury consultant, Ruth Holmes, CDE ("Holmes"), and Dr. Kevorkian's former counsel and Gorosh's former supervisor, Michael Schwartz, Esq. ("Schwartz"). Examples of such detailed information and facts have been set forth in affidavits sworn to by Dwyer, Holmes and Schwartz, which affidavits are attached hereto as Exhs. A-C.

Gorosh's assistance was inadequate due to numerous errors, miscalculations, and breaches of professional responsibility. The detailed information received from Dwyer, Holmes and Schwartz as well as the affidavits attached hereto reveal what actually happened during the pre-trial and trial proceedings, and explain why the defense presented on behalf of Dr. Kevorkian was so inadequate. The blame for the deficiencies in presenting a defense on behalf of Dr. Kevorkian falls squarely on the shoulders of Gorosh, who failed to effectively perform his dual roles as advocate and advisor, and left his client without the legal information necessary to present a competent defense.

As revealed by Dwyer and Holmes, Gorosh failed in his role as advocate to such an extent that Dr. Kevorkian was forced to present his own defense. Although Gorosh acted as an advocate during the pre-trial proceedings, his assistance in this regard was utterly ineffective as disclosed by Dwyer and Holmes. As evidenced by the affidavit of Schwartz, it was clear Gorosh was not competent to handle a case of

this magnitude and complexity by himself. Even though he associated with co-counsel, he did not listen to any of co-counsel's advice, and shut out the rest of the defense team from any substantive role. As revealed in Dwyer's affidavit, Gorosh allowed communications to completely break down among the defense team. He did not keep co-counsel apprised of news and events related to the trial and defense strategy. Gorosh was more interested in talking to the media than with the defense team and his client, Dr. Kevorkian.

In addition to shutting out the defense team, Gorosh also ignored and disregarded the wishes of his client, Dr. Kevorkian. As confirmed by the affidavit of Holmes, Gorosh withheld advice from Dr. Kevorkian, and did not respect Dr. Kevorkian's wishes as to how his representation was to be handled. According to both Dwyer and Holmes, Gorosh continued to include another young attorney in the defense team in direct contravention of Dr. Kevorkian's instructions.

As evidenced by the affidavit of Dwyer, Gorosh obstinately insisted on proceeding with a motion to quash the assisted suicide count, with the full knowledge that this could prevent his client from calling favorable witnesses at trial. As further evidenced by Dwyer's affidavit, Gorosh was not adequately prepared throughout his representation of Dr. Kevorkian, yet informed co-counsel that he would handle virtually all preparations, and assured Dr. Kevorkian that everything was under control. Instead of preparing for trial, Gorosh spent breaks in trial talking to friends and the press.

Appendix I

According to Dwyer's and Holmes' affidavit, although Gorosh instructed Dr. Kevorkian to call the Youks as witnesses, he had done nothing to prepare legal support for this position, leaving Dr. Kevorkian confused and helpless. Even when the Court graciously provided the opportunity and time for the defense to present a written memorandum in support of its position, Dwyer was left to hurriedly put something together to attempt to protect Dr. Kevorkian and preserve the record.

As disclosed by Dwyer, while Gorosh had initially been retained as an advisor for trial, Dr. Kevorkian decided to allow him to conduct his defense at trial when Judge Cooper refused to allow a hybrid defense, partly conducted by counsel and partly by Dr. Kevorkian. According to Dwyer and Holmes, only when Gorosh refused to abide by Dr. Kevorkian's wishes did Dr. Kevorkian decide to conduct his own defense. In addition to ignoring Dr. Kevorkian's wishes, Gorosh stood in the way of allowing Dr. Kevorkian to retain Dwyer as trial counsel. As revealed by Dwyer, Gorosh refused to allow her to take over both by refusing to step aside when this was clearly in the best interest of his client, and by threatening Dwyer's professional reputation if she proceeded against his wishes.

Thus, Gorosh failed in his role as advocate, and in light of this, Dr. Kevorkian was left with no choice but to conduct his own defense.

The information and facts received from Dwyer and Holmes make clear that as Dr. Kevorkian proceeded with his own defense, Gorosh wholly failed in his role as advisor. Gorosh was insulted and embarrassed when he learned he

would not be conducting the trial himself. In retaliation for this, he withheld advice that he had a duty to provide, and undermined his client in open Court and in chambers. Gorosh made certain that Dr. Kevorkian's defense would not be successful by withholding advice, and preventing Dr. Kevorkian from getting advice during the trial proceedings directly from Dwyer.

Gorosh's behavior in the presence of the jury only served to undermine Dr. Kevorkian. As confirmed by the affidavits of Dwyer and Holmes, Gorosh gestured, rolled his eyes, and made comments under his breath during Dr. Kevorkian's presentations in front of the jury. According to Dwyer, during the trial Gorosh refused to make appropriate objections, even though Dwyer urged him to do so. Gorosh physically insisted on retaining his seat next to Dr. Kevorkian, although Dr. Kevorkian requested that Dwyer be seated next to him in order to provide advice.

As recounted by Dwyer, Gorosh's behavior in chambers also subverted Dr. Kevorkian's position. In chambers, Gorosh indicated to Judge Cooper that Dr. Kevorkian was incompetent and that he would be disruptive to the proceedings.

Because of Gorosh's dereliction of his duties as advocate and advisor, Dr. Kevorkian did not receive the "counsel" guaranteed him by the Sixth Amendment, and was thus deprived of his right to a fair trial. Based upon the information and facts received from Dwyer, Holmes and Schwartz, Gorosh flouted his professional responsibilities as stated in the Michigan Rules of Professional Conduct. These Rules emphasize the overarching role of an attorney to perform in the best interests of his client and to zealously protect his

client's rights. The Rules further confirm an attorney's responsibility within the legal system to ensure the fair administration of justice. Gorosh's blatant disregard for even the most minimal standards of professional conduct resulted in the presentation of a defense that was an embarrassment and an affront to the legal system, and thus deprived Dr. Kevorkian of a fair trial. In order to reverse this miscarriage of justice, a new trial should be conducted in which Dr. Kevorkian's Constitutional rights will be ensured.

ARGUMENT

I. STANDARD OF REVIEW FOR A NEW TRIAL.

A. *Standard of Review.*

The standard of review for a motion for granting a new trial is provided by MCR 6.431. The trial court may order a new trial on any ground that would support appellate reversal of the conviction or because it believes that the verdict has resulted in a miscarriage of justice. MCR 6.431(b). A new trial may be granted where the verdict is against the great weight of the evidence or to prevent an injustice. *People v. Herbert*, 444 Mich 466, 475; 511 NW2d 654 (1993).

B. *Dr. Kevorkian is Entitled to a New Trial Because of Ineffective Assistance of Counsel.*

As this brief and the information and facts received from Dwyer, Holmes and Schwartz demonstrate, Dr. Kevorkian is entitled to a new trial due to the ineffective assistance of Gorosh. Gorosh made numerous tactical and professional

errors during the representation that, separately and certainly in aggregate, deprived Dr. Kevorkian of his rights to effective assistance of counsel and a fair trial. Based upon the facts set forth herein as well as the affidavits attached hereto, a new trial should be granted pursuant to MCR 6.431.

C. *In The Alternative, Dr. Kevorkian Is At Least Entitled To An Evidentiary Hearing To Determine Whether a New Trial is Warranted.*

In the event that this Court is unable to grant the instant Motion based upon the facts set forth herein and the affidavits attached, then Dr. Kevorkian should at least be permitted to present evidence at an evidentiary hearing in order to further support his claim of ineffective assistance of counsel. When a defendant alleges ineffective assistance of counsel, he should be permitted to fully establish a factual record to support his claim in the trial court. *People v. Armstrong*, 124 Mich App 766, 770; 335 NW2d 687 (1983); *People v. Breakfield*, 63 Mich App 692, 698; 234 NW2d 758 (1975). An evidentiary hearing may help the Court in determining whether a new trial is warranted, as well as preserve the issues for appellate review, if necessary. *People v. Stubli*, 163 Mich App 376, 379; 413 NW2d 804 (1987).

The importance of an evidentiary record was stated by the Michigan Supreme Court in *Ginther*.

> A convicted person who attacks the adequacy of the representation he received at his trial must prove his claim. To the extent his claim depends on facts not of record, it is incumbent upon him

> to make a testimonial record at the trial court . . . which evidentially supports his claim and which excludes hypotheses consistent with the view that his trial lawyer represented him adequately.

People v. Ginther, 390 Mich 436, 442-443; 212 NW2d 922 (1973). In this case, all persons mentioned herein would be able to testify at an evidentiary hearing as to the complete facts and circumstances surrounding Gorosh's representation of Dr. Kevorkian.

II. DR. KEVORKIAN IS ENTITLED TO A NEW TRIAL BECAUSE HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS.

A. *The Standard for Granting a New Trial Due to Ineffective Assistance of Counsel.*

Dr. Kevorkian is guaranteed the right to effective assistance of counsel by both the United States and Michigan Constitutions. The Sixth Amendment to the United States Constitution guarantees an accused "the right . . . to have the assistance of counsel for his defense." US Const, Am VI. The Michigan Constitution also guarantees, "[i]n every criminal prosecution, the accused shall have . . . assistance of counsel for his defense." Const. 1963, Art. 1, §20.

It is well-settled that the right to counsel includes the right to effective assistance of counsel. *McMann v. Richardson*, 397 US 759, 771 n.14 (1970). At issue here is

not the denial of counsel, but the actual performance of counsel. *People v. Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997). The inquiry into the performance of counsel is particular, and the question is whether counsel's actual performance undermined confidence in the reliability of the result. *Id.*

The benchmark case in Michigan describing the standards for claims of ineffective assistance of counsel is *People v. Pickens*, 446 Mich 298; 521 NW2d 797 (1994). Michigan has adopted the federal test described in *Strickland v. Washington*, 466 US 668 (1984), for reviewing claims of ineffective assistance of counsel. The Michigan Constitutional provision affords the same protection as the Sixth Amendment to the United States Constitution with regard to the guarantee of assistance of counsel. *Pickens*, 446 Mich at 302. In order to determine whether counsel's assistance was ineffective, the reviewing court must determine: (1) whether counsel's performance was objectively unreasonable; and (2) if so, whether the defendant was so prejudiced by counsel's defective performance that he was deprived of a fair trial. *Pickens*, 446 Mich at 309. The test requires the greatest level of factual inquiry into the conduct of the defense and its effect on the outcome of the trial. *Mitchell*, 454 Mich at 155.

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B. *The Assistance Gorosh Provided Fell Far Below The Standards For Effective Assistance of Counsel.*

1. *Gorosh's Representation of Dr. Kevorkian Fell Far Below The Standards Mandated by The Michigan Rules of Professional Conduct.*

Gorosh violated the Michigan Rules of Professional Responsibility (the "Rules") during his representation of Dr. Kevorkian. The Rules detail a lawyer's duties as advisor and advocate. As an advisor, "a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications." MRPC 1.0, *comment*. As an advocate, "a lawyer zealously asserts the client's position under the rules of the adversary system." *Id.* A lawyer also should be competent, prompt, and diligent in all professional functions. *Id.* Gorosh abdicated these roles, and did not provide Dr. Kevorkian with effective advice or advocacy.

First, Gorosh was not qualified to handle the defense of Dr. Kevorkian, who was charged with a serious criminal offense, carrying a maximum penalty of imprisonment for life. The Rules state,

A lawyer shall provide competent representation to a client. A lawyer shall not:

> (a) handle a legal matter which the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it; [or]

(b) handle a legal matter without preparation adequate in the circumstances.

MRPC 1.1.

The comment to Rule 1.1 goes on to state, "[i]n determining whether a lawyer is able to provide competent representation in a particular matter, relevant factors include the relative complexity . . . of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter, and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question." MRCP 1.1, *comment*. Additionally, "competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation." *Id.*

According to co-counsel, Dwyer, and Gorosh's former employer, Schwartz, Gorosh was not competent to handle the case, nor to prepare and aid Dr. Kevorkian in presenting his own defense. Exh. B at 3-6. Gorosh had minimal experience as he had only been practicing for three years. *Id.* at 1-2. He had limited trial experience, and had never handled a felony case, much less a homicide. *Id.* Gorosh's former supervisor, Schwartz, attests that Gorosh was ill-equipped to serve as lead defense counsel in a significant murder case because of his inexperience, his inability to grasp important strategic considerations, and his failure to consider the best interests of his client. *Id.*

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It is clear Gorosh was out of his depth from the preliminary hearing onward. He was not familiar with the term "gastro-enterologist," instead referring to a "gastroentemologist" throughout the preliminary hearing. Gorosh struck the public policy arguments from Dwyer's motion to quash the murder count because "he did not understand [them]." Exh. A at 2. Gorosh refused to take the advice of co-counsel, Dwyer. *Id.* at 1-2. Despite lacking sufficient knowledge, experience, and preparation to properly handle the case, Gorosh persisted in running the show. *Id.* at 2. He displayed bitterness and stubbornness when input was provided, or when his ideas were challenged, and behaved similarly when he ultimately did not conduct the trial himself.

Notwithstanding his lack of personal competence to handle the case, Gorosh did not associate with any other lawyer who was capable of handling the case in explicit violation of MRPC 1.1(a). Gorosh ignored advice he received from experienced attorneys at his former firm, including advice from Schwartz, an attorney with over twenty-five years experience, and Geoffrey Fieger, an attorney who had successfully defended Dr. Kevorkian in a number of previous assisted suicide cases. Exh. B at 3-4. Regardless of the competence and experience of co-counsel, Gorosh did not listen to any of their advice, and made all the decisions on his own. Exh. A at 2. Gorosh completely shut out co-counsel, Dwyer. It became clear to Dwyer that Gorosh was not heeding any of her advice, and she attempted to withdraw. Gorosh would not allow this because of the relationship that had developed between Dwyer and Kevorkian. At the same time Gorosh was insisting that Dwyer stay on the case, he refused to keep her informed about the case, and effectively removed

her from the decision-making process. Dwyer was present only for appearances, as she had no substantive input into the case. Gorosh was running the show, despite his lack of competence to do so alone. *Id.*

Second, "the client has the ultimate authority to determine the purposes to be served by legal representation." MRPC 1.2, *comment*. Dr. Kevorkian should have had the ultimate authority to direct his defense. It was Gorosh's obligation to abide by the wishes of his client, Dr. Kevorkian, and provide whatever assistance he requested. Instead, Gorosh demanded things be done his way, and ignored or subverted the wishes of his client. When Dr. Kevorkian decided to conduct his own defense and requested only advice from Gorosh, Gorosh was insulted and was unable to function in the capacity of an advisor.

Third, Gorosh sought publicity for himself at the expense of his client's best interests. Rule 3.6 states,

> A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.

MRPC 3.6. Despite this rule, Gorosh publicly called the appeal "a lot of pretty words," undermining Dr. Kevorkian's credibility. Gorosh rushed out to the press conference immediately after the preliminary hearing, instead of staying behind to discuss the case with his co-counsel and his client as Dwyer has

reported. Even as Gorosh's role and interest in the trial proceedings waned, he insisted on issuing press reports and dealing with the media. Exh. A at 2. Gorosh's "meetings" with co-counsel, Dwyer, often consisted of her listening to Gorosh speaking to media personalities on the telephone as Dwyer has revealed. *Id.* at 1. In fact, Dwyer has disclosed that she warned Gorosh about some of the comments he was making to the press, but the admonitions seemed to have no effect. Gorosh was clearly more interested in attending press conferences and talking to the media than in serving his client competently and protecting his client's interests. Exhs. A at 1-2; C at 4.

Fourth, Gorosh did not maintain adequate communication with Dr. Kevorkian. Rule 1.4 states, "[a] lawyer shall keep a client reasonably informed about the status of a matter and comply promptly with reasonable requests for information." MRPC 1.4(a). A lawyer should maintain communication with a client concerning representation. MRCP 1.0, *comment*. Although Gorosh met with Dr. Kevorkian from time to time to discuss the case, he merely assured Dr. Kevorkian that everything was being handled. Exh. C at 2. Gorosh, did not however, adequately coach and aid Dr. Kevorkian in his case preparation, particularly as to how to handle calling witnesses Terry and Melody Youk. *Id.* Furthermore, Gorosh essentially ceased advising his client as communications broke down. Exhs. A at 3-4; C at 3-4. He did not provide the aid and assistance Dr. Kevorkian wanted and needed before and during the trial. Exh. C at 3. Thus, Gorosh did not maintain adequate communications with his client in light of his role as an advisor to a defendant proceeding pro se.

Finally, Gorosh's behavior in the courtroom was totally inappropriate. A lawyer has a duty, in accord with his role as an advocate, to "act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." MRCP 1.3, *comment*; MRCP 1.0, *comment*. Gorosh's courtroom behavior was a violation of this duty to zealously represent the interests of his client. Gorosh's behavior at counsel table was not only injurious and prejudicial to his client because of the negative impact it may have had on the jury, but is was also undignified and discourteous. Exhs. A at 4; C at 3-4. It was wholly inappropriate to make gestures, roll eyes, or sigh while Dr. Kevorkian was presenting his case. Gorosh's behavior could only serve to draw the attention of the jury to Gorosh's doubts about his client's defense. According to the defense's own jury consultant, such behavior indicated that Gorosh lacked confidence in his client, Dr. Kevorkian. Exh. C at 4. Indeed, the jury could not not help but see this behavior because Gorosh insisted on remaining seated next to Dr. Kevorkian at counsel's table, even when Dr. Kevorkian suggested otherwise. Gorosh was cautioned to stop this inappropriate behavior, but did not.

Gorosh's behavior at trial was representative of the fact that Gorosh had wanted to conduct the trial himself, and that he was perturbed by his exclusion from this more active role. Gorosh attempted to undermine his client in a deliberate and blatant attempt to force Dr. Kevorkian to allow Gorosh to try the case as an advocate. For example, in chambers the very morning of trial, Gorosh made comments to Judge Cooper that Dr. Kevorkian was incompetent to defend himself and could be disruptive during the court proceedings. Gorosh refused to provide advice, in an attempt to force Dr. Kevorkian

to change his mind. Regardless of Gorosh's personal feelings, it was incumbent upon him to keep his feelings to himself during the trial, especially in the presence of jury while his client presented his defense, and it was unethical and irresponsible of Gorosh to manipulate Dr. Kevorkian by withholding advice and consultation.

Additionally, Gorosh abandoned his role as advisor, by withholding advice and consultation from his client. MRPC 10.0, *comment*. Not only did Gorosh refuse to provide the advice Dr. Kevorkian wanted and needed, he also did not allow co-counsel, Dwyer, to sit next to Dr. Kevorkian at trial so that she could provide advice. Exh. A at 4. Gorosh ceased giving his client legal advice, and stood in the way of Dr. Kevorkian receiving legal advice from any other source.

2. *Gorosh's Performance Was Unreasonable and Prejudiced His Client, Dr. Kevorkian.*

A. *Gorosh's Performance As Counsel Was Objectively Unreasonable.*

Defense counsel must perform at least as well as a lawyer with ordinary skill in the criminal law, and must conscientiously protect his client's interests. *People v. Garcia*, 398 Mich 250, 264; 247 NW2d 547 (1976). Here, Gorosh did not perform as well as a lawyer with ordinary skill in criminal law, and he certainly did not conscientiously protect his client's interests. Indeed, Gorosh was at odds with his client throughout most of the representation. Exh. A at 3. Gorosh made several mistakes prejudicial to Dr. Kevorkian that a reasonably skilled lawyer would have avoided. In fact, co-counsel,

Dwyer, was so concerned about the quality of representation that Dr. Kevorkian was receiving that she was hesitant to be associated with the case. *Id.* at 1.

First, despite the advice of co-counsel, Dwyer, Gorosh moved to quash the assisted suicide count. Exhs. A at 2; C at 3. Acting against the advice of co-counsel, Dwyer, and the stated wishes of his client, Gorosh insisted on going forward with this motion. *Id.* Furthermore, Gorosh's former mentor, Schwartz, also warned him on two separate occasions not to move to quash the assisted suicide count. Exh. B at 3-4. Judge Cooper explicitly told Gorosh that eliminating the assisted suicide count would lead to the exclusion of testimony about the suffering of Thomas Youk's family and about Thomas Youk's medical condition. As Dwyer has revealed, she had also discussed this very issue with Gorosh. *Id.* Thus, despite being well aware of the facts and certain results of his actions, Gorosh proceeded anyway, to the detriment of his client, Dr. Kevorkian.

Second, Gorosh did not interject nor instruct Dr. Kevorkian to make appropriate objections during trial, even though co-counsel, Dwyer, admonished him to do so. It was Gorosh's duty as an attorney to protect the rights of his client. Dr. Kevorkian needed help as to the proper objections to raise, and as to trial procedure. This is the very sort of legal help and advice Gorosh, as lead defense counsel, was obligated and expected to give his client in his role as advisor.

Third, Gorosh allowed the relationships among co-counsel to deteriorate to such a point that it was impossible for them to provide effective assistance to Dr. Kevorkian.

Gorosh threatened to tell the Judge that Dwyer's pre-trial motion to quash the murder count was "ridiculous" as Dwyer has reported. He publicly disparaged the work Dwyer was doing on the appeal, calling it merely "a lot of pretty words." The defense team was hardly communicating with each other during the trial, and were not functioning as the counsel guaranteed by the Constitution. *Id.* Gorosh refused to listen to, much less heed, the advice of co-counsel as Dwyer has made clear. According to Dwyer, Gorosh promised both Dwyer and another young lawyer that they would participate in the trial, pitting them against each other from the start. This led to bitterness and disagreements when it became evident they would not both participate in the trial.

Fourth, Gorosh allowed his relationship with his client, Dr. Kevorkian, to deteriorate to such a point that it was impossible to provide effective assistance. Gorosh's conversations with his client, Dr. Kevorkian, were reduced to shouting matches prior to trial. Exh. A at 3. Gorosh would not allow Dr. Kevorkian to have the counsel of his choice. *Id.* Gorosh indicated Dwyer could not conduct the trial, despite Dr. Kevorkian's wishes. *Id.* In fact, Dwyer has revealed that Gorosh threatened to fire Dwyer and implied that her professional reputation would be damaged if she proceeded to represent Dr. Kevorkian alone. Furthermore, despite Dr. Kevorkian's specific instructions that the other young lawyer was not to be part of the legal team, Gorosh continued to keep the other lawyer present. Exhs. A at 3; C at 3.

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When Dr. Kevorkian decided to represent himself against the wishes of Gorosh, communications broke down entirely. Exh. A at 3. At this point, Gorosh had essentially ceased listening to and assisting Dr. Kevorkian. Refusal of counsel to participate in the course and conduct of his client's trial has been severely criticized by the Michigan Court of Appeals. *People v. Travis*, 182 Mich App 389, 395; 451 NW2d 641 (1990). Despite the fact that Gorosh was not helping his client, he insisted on sitting next to him at trial. Dr. Kevorkian had requested that Dwyer sit next to him in order to provide him with advice during trial. Gorosh refused to allow this, insisting on maintaining his seat next to Dr. Kevorkian. Thus, Gorosh did not follow the instructions of his client, and allowed their relationship to erode to such a point that it was impossible to provide effective assistance. Exh. C at 3-4.

Finally, Gorosh put his own interests ahead of those of his client. *Id.* at 4. Gorosh demonstrated repeatedly that what was most important to him was the attention he received from this case. Gorosh wanted to do everything that was high-profile himself. Gorosh handled all relations with media, he insisted on sitting next to Dr. Kevorkian in the courtroom, and he refused to withdraw as counsel even when it became obvious to all involved he was not functioning as such. He prohibited Dwyer from representing Dr. Kevorkian and conducting the trial, threatening to fire her. Gorosh was more concerned about his own reputation, and the effect being removed from the case would have on him, than about the best interests of Dr. Kevorkian. Exh. A at 3.

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Even as Gorosh did less and less actual trial work, he persisted in maintaining his high-profile status. Gorosh advised Dr. Kevorkian to attempt to call the Youks as witnesses at trial, even though Gorosh had not done the necessary legal research to support this. *Id.* at 4. Even as this was occurring, Gorosh spent his lunch break talking to friends and media rather than researching the legal issue at hand. Despite his lack of attention to the case, Gorosh made sure he continued to handle the media and issue press releases so that he could continue to garner some attention. *Id.* at 1.

Gorosh's desire for the media spotlight and his indignation and displeasure at not conducting the trial caused Gorosh to lose sight of his responsibilities. Exh. C at 4. Gorosh neglected his duty to zealously represent his client, and he put his own interests ahead of his client's interests. *Id.*; Exh. B at 5; MRCP 1.3.

Most important, Gorosh acted irresponsibly and unprofessionally when he learned that Dr. Kevorkian decided to conduct his own defense. Gorosh was angered and embittered because he would not have the spotlight at trial. Once this decision was made, Gorosh was not only ineffective, he actually undermined his client, Dr. Kevorkian's, position. *Id.* at 6. Gorosh withheld advice and information from his client, Dr. Kevorkian. Exhs. A at 3-4; B. Gorosh's behavior in court and in the presence of the jury, weakened Dr. Kevorkian's presentation. Exhs. A at 4; C at 3-4. Gorosh blatantly rolled his eyes, emitted long heavy sighs, put his head in his hands, and made derogatory comments about Dr. Kevorkian's presentation under his breath. Exh. A at 4.

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B. *Dr. Kevorkian Was Prejudiced By Counsel's Unreasonable Performance.*

Dr. Kevorkian was materially prejudiced by the poor performance of counsel. There is prejudice to the defendant if there is a reasonable probability that, absent the errors, the finder of fact would have had reasonable doubt respecting guilt. *Pickens*, 446 Mich at 312. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* at 314.

First, Dr. Kevorkian was deprived of presenting favorable testimony because Gorosh did not properly prepare legal and factual reasons to present to the Court as to why such testimony should be permitted. Exh. A at 4. Such testimony would have been beneficial to Dr. Kevorkian because it would have shed additional light on the facts and circumstances surrounding the events that led to his arrest. Such dramatic testimony may very well have provided the jury with reasonable doubt about Dr. Kevorkian's guilt and resulted in Dr. Kevorkian's acquittal.

Second, Dwyer's motion to quash the murder count was not competently presented. *Id.* at 2. The success of the motion to quash the murder count would have been much more beneficial to Dr. Kevorkian than the quashing of the assisted suicide count. Gorosh chose not to fully pursue the motion to quash the murder count because he felt it was at odds with his own motion to quash the assisted suicide count. *Id.* at 4. In addition to his lackluster presentation of the motion to quash the murder count, Gorosh struck the basic public policy

arguments from the written motion because he did not understand them, thus weakening the motion even further. *Id.* at 2.

Third, Dr. Kevorkian was hampered in his Constitutional right to retain the counsel of his choice by Gorosh. Despite the fact that Dr. Kevorkian indicated he wanted Dwyer to conduct his trial, Gorosh refused to allow this. *Id.* at 3. Gorosh refused to step aside, despite the obvious and insurmountable problems among the defense team. *Id.*. Because Dr. Kevorkian was not allowed to choose his own counsel, he elected to conduct his own defense, without adequate aid from Gorosh who was upset that he was not personally conducting the defense.

Finally, Dr. Kevorkian was not adequately prepared by Gorosh to conduct his own defense. Gorosh essentially abdicated his role as advisor when he learned he would not be conducting the trial. Gorosh became "more independent, frustrated, and less able to communicate" with Dr. Kevorkian. Exh. C at 4. He did not adequately coach and prepare Dr. Kevorkian for trial, and did not provide the help Dr. Kevorkian wanted and needed. *Id.* Because of this, Dr. Kevorkian was not able to adequately and competently present his defense to the jury.

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III. DR. KEVORKIAN IS ENTITLED TO A NEW TRIAL DUE TO THE SERIOUS MISTAKES MADE BY GOROSH IN ACCORDANCE WITH THE MICHIGAN COMMON LAW AS WELL.

A. *The Standard for a New Trial Based on A Serious Mistake By Counsel.*

Dr. Kevorkian is entitled to a new trial pursuant to MCR 6.431 due to serious mistakes made by Gorosh as lead defense counsel under the Michigan Common Law. In addition to the Constitutional claim of ineffective assistance of counsel, Michigan jurisprudence also recognizes the "serious mistake of counsel" doctrine as another avenue for a defendant to show he is entitled to a new trial based on deficient representation. Even where the assistance of counsel satisfies the Constitutional requirement, a defendant still has a common law right to a fair trial which may be denied if his attorney makes a serious mistake. *People v. Sealy*, 136 Mich App 168, 175-176; 356 NW2d 614 (1984); *People v. Smith*, 108 Mich App 338, 343; 310 NW2d 235 (1981); *People v. Lotter*, 103 Mich App 386, 389; 302 NW2d 879 (1981). Dr. Kevorkian was denied a fair trial due to serious mistakes of counsel, and is thus entitled to a new trial.

In deciding whether to grant a new trial based on a serious mistake of counsel, a reviewing court should balance the public's interest in avoiding purposeless retrials against a defendant's interest in having all his/her rights recognized and asserted. *People v. DeGraffenreid*, 19 Mich App 702, 718; 173 NW2d 317 (1970). A new trial should be granted if it appears that the defendant may be acquitted if the mistake is not repeated. *Id.*; *Lotter*, 103 Mich App at 389.

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B. *Gorosh Made Several Serious Mistakes That Warrant a New Trial.*

Gorosh made several serious mistakes at trial, in the absence of which Dr. Kevorkian may very well have been acquitted.

First, Gorosh took on a case as lead defense counsel that he knew, or should have known, he was incapable of handling primarily alone in violation of the Michigan Rules of Professional Conduct. MRPC 1.1. Gorosh simply did not have the experience or resources necessary to handle a case of this magnitude without significant assistance. Exh. B at 1-2, 4. Gorosh did not associate himself with other attorneys who could provide the needed expertise. Indeed, he ignored the advice of experienced attorneys when it was offered, and entirely shut out his co-counsel, Dwyer, from any substantive role in the case. Exh. A at 3-4. Instead, Gorosh received only some research assistance from a young attorney who had just passed the bar examination, and some assistance from another young lawyer whom Dr. Kevorkian indicated should not participate in his defense.

Second, Gorosh did not adequately prepare a defense for Dr. Kevorkian. Although Gorosh assumed most of the responsibility for preparing a defense in his role as lead counsel, he did not perform the work necessary to do so. Exh. A at 2-3. Gorosh was not prepared for the preliminary hearing. He was not familiar with the term "gastroenterologist." The weekend before trial, just prior to Dr. Kevorkian's decision to conduct the trial himself, Gorosh spent most of his time arguing with co-counsel and Dr. Kevorkian, rather than preparing a defense. *Id.*.

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Although Gorosh repeatedly assured Dr. Kevorkian that he was properly preparing, Gorosh spent breaks in trial talking to friends and the media rather than working with the defense team. Exh. C at 2, 4. At defense team meetings, Gorosh talked to the media for hours on the telephone, while Dwyer was left to sit and watch him. Gorosh ignored Dwyer when she attempted to discuss trial issues. Exh. A at 1. Gorosh instructed Dr. Kevorkian to call the Youks as witnesses, but had not prepared any legal reasoning to support this position. *Id.* at 4. Even when Judge Cooper allowed the defense to prepare a written memorandum in support of this, Dwyer was left to scramble to put something together at the last moment. Gorosh's legal preparation was essentially nil, leaving Dr. Kevorkian without sound legal support for his defense. *Id.*

Third, Gorosh moved to quash the assisted suicide count, in lieu of fully preparing the motion to quash and/or dismiss the murder count. *Id.* at 2. Despite the advice of co-counsel, experienced attorneys Schwartz and Geoffrey Fieger, and the specific instructions of Dr. Kevorkian himself, Gorosh insisted on pursuing his own course to quash the assisted suicide count. Exhs. A at 2; B at 3-4; C at 3-4. Schwartz explicitly pointed out to Gorosh the importance and strategic advantages of maintaining the assisted suicide charge. Exh. B at 4. Nevertheless, Gorosh insisted it was important to have whatever charges he could dismiss as soon as possible, regardless of what arguments he would have to give up on behalf of his client. *Id.* Judge Cooper clearly indicated what the results of quashing the assisted suicide count would be. All these warnings had no impact on Gorosh.

Fourth, Gorosh refused to step aside as counsel, and allow Dwyer to handle the case, pursuant to his client, Dr. Kevorkian's, stated wishes. Exh. A at 3. Even as his relationship with his co-counsel and his client deteriorated, Gorosh refused to step aside as counsel. *Id.* Not only that, he told Dr. Kevorkian that Dwyer could not serve as his counsel, although this was Dr. Kevorkian's wish, and threatened Dwyer that her reputation would be damaged if she took over as Dwyer has recounted. Gorosh was attempting to play a game of brinkmanship, backing Dr. Kevorkian into a corner where he was left only with the unappealing choices of representing himself, or allowing Gorosh to conduct the trial against his wishes. *Id.* This appalling behavior by Gorosh was both a breach of ethics and a serious mistake entitling Dr. Kevorkian to a new trial. *Id.* Gorosh was either unwilling or unable to subordinate his own interests for the benefit of his client. Exh. B at 3.

Fifth, Gorosh failed to properly interpose objections, or to properly instruct Dr. Kevorkian to raise objections during trial. For example, Gorosh did not object during the prosecution's closing argument in which the prosecutor raised the issue of lack of consent, and stated that Dr. Kevorkian had somehow manipulated Thomas Youk into becoming a victim of murder. Testimony and evidence regarding the issues of consent and the condition of Thomas Youk were precisely what the prosecutor had prevented Dr. Kevorkian from introducing throughout the trial. Gorosh also did not protest during Dr. Kevorkian's closing argument, instead allowing the prosecutor to object, violating Dr. Kevorkian's Fifth Amendment rights by making reference to his decision not to testify.

Finally, Gorosh became embittered and was at odds with his own client. Gorosh clearly wanted to conduct the trial. He viewed this as a prize. Gorosh was acutely aware of the media and public attention this trial would receive. Exhs. A at 1, 4; B. He wanted and sought this spotlight, and made a point of talking to the media. *Id.* He felt holding a press conference after the preliminary hearing was more important than consulting with his client. When Dr. Kevorkian made the decision to conduct his own defense, Gorosh was upset. He was angered that he would not get the attention that would come from conducting Dr. Kevorkian's defense in the courtroom. In response to this, he withheld advice he knew Dr. Kevorkian wanted and needed, in an effort to punish Dr. Kevorkian. *Id.* He was not able to mask his displeasure as he sat at counsel table during the trial. His gestures, body language, and whispered comments made his feelings obvious. Exhs. A at 4; B. The jury could easily have viewed this as a lack of confidence in his client, Dr. Kevorkian. Exh. C at 4. Co-counsel Dwyer has reported that she felt it unbearable to share counsel's table with Gorosh, and felt trapped. Exh. A at 6. Despite being told repeatedly of his inappropriate behavior, Gorosh continued acting in the same way. Exhs. A at 6; C at 4.

CONCLUSION

For all the foregoing reasons, Dr. Kevorkian respectfully requests this Honorable Court to grant a new trial under MCR 6.431 in the interest of avoiding a clear miscarriage of justice, or, in the alternative, to grant an evidentiary hearing to determine whether a new trial is appropriate and to preserve these issues for possible appeal, if necessary.

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Respectfully submitted,

MORGANROTH & MORGANROTH

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Dated: May 21, 1999

Appendix I

EXHIBIT A

STATE OF MICHIGAN)
) SS
COUNTY OF OAKLAND)

Lisa Dwyer, Esq., having first been duly sworn, deposes and says:

1. I am an attorney who has been a member of the State Bar of Michigan since 1993.

2. I served as co-counsel for Defendant, Dr. Jack Kevorkian, in the instant action at the request of lead defense trial counsel, David Gorosh, Esq.

3. I submit this affidavit at the request of Dr. Kevorkian's appellate counsel.

4. I have personal knowledge of the facts and information set forth herein, and I am competent to testify thereto if called as a witness at an evidentiary hearing or otherwise.

5. In November 1998, David Gorosh contacted me and requested me to serve as co-counsel in an up-and-coming matter with Dr. Kevorkian.

6. During the initial stages of our co-representation of Dr. Kevorkian, it appeared to me as though I would have input regarding defense strategies. However, by the time of the preliminary examination, it became apparent that my input regarding defense strategies would have little weight with Mr. Gorosh.

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7. By January 1999, I discussed with Mr. Gorosh withdrawing as co-counsel because our working relationship had deteriorated, primarily because he dismissed my input regarding defense strategies. In addition, I was working between 60-70 hours per week at another firm because my boss was on a month long vacation and, therefore, I had a great deal of additional responsibilities. Because Mr. Gorosh dismissed my input to the case, my association with the case seemed pointless and I was working myself to death. This was a particularly important point during our representation of Dr. Kevorkian because motion deadlines were approaching.

8. Despite my misgivings, Mr. Gorosh persuaded me to continue as co-counsel because I had developed a good working relationship with Dr. Kevorkian. I agreed to continue to act as co-counsel because I felt a sense of commitment to the defense of Dr. Kevorkian, a sense of commitment to Mr. Gorosh despite the way things were proceeding, and a belief that I could provide a valuable contribution if given the chance.

9. Mr. Gorosh's control over all aspects of the case became unyielding. Mr. Gorosh ignored my input into defense strategies, withheld information from me, made public statements to the media without consulting me, and refrained from notifying me about issues that had arisen. It also appeared to me that Mr. Gorosh was ignoring the input of Dr. Kevorkian.

10. For instance, Mr. Gorosh and I were directly at odds with regard to the motion practice on the case. Despite Dr. Kevorkian and my input regarding the filing of a motion to quash the criminal assistance to suicide count, Mr. Gorosh proceeded with this motion as the leading motion. Further, the motion to quash the murder charge written by me was discounted by Mr. Gorosh as being contradictory to his motion to quash the assisted suicide count. Also, a common law challenge to the murder count that had been prepared by me, and included in the original draft of the motion to quash the murder charge, was deleted from the motion by Mr. Gorosh because he failed to grasp the legal argument.

11. Mr. Gorosh and I argued heatedly about these two motions wherein he informed me that nobody knew the case better than him. I indicated that I was of the opinion that when defending a murder case all efforts should be put toward attacking the murder count. Also, I reminded him that the motion challenging the murder count was meritorious. Further, I explained to him that there was a way to credibly argue both motions, but that both motions had to be argued. Mr. Gorosh rejected my input and, at the motion hearing, neglected to zealously advocate the dismissal of the murder count.

12. As the trial approached, it was my understanding that Dr. Kevorkian wished to proceed with a hybrid defense — Mr. Gorosh and I would serve as advocates regarding certain matters and as advisers regarding others. Despite this understanding and the numerous prompts by me to Mr. Gorosh to discuss precise trial duties with Dr. Kevorkian, such a necessary conversation never took place.

13. On March 19, 1999, Judge Jessica Cooper advised Mr. Gorosh and me that she would not allow a hybrid defense at trial. Judge Cooper indicated that either Dr. Kevorkian would represent himself at trial or that he would be represented by counsel, but not both. Dr. Kevorkian agreed to allow Mr. Gorosh and me to conduct the trial.

14. Mr. Gorosh indicated that he would conduct voir dire — because it would be a "story" if he did not conduct jury selection. He also stated he would conduct opening statement, closing argument, and examination the witnesses, aside from Dr. Dragovic. He also said he would conduct the examination of Dr. Kevorkian, despite the fact that he and Dr. Kevorkian were not communicating and had very little substantive conversation about the case.

15. During the weekend proceeding the trial, March 20 and 21, 1999, everything fell apart. That Saturday, I did not see Mr. Gorosh make any substantive preparations for trial. He spent most of the day arguing with the other attorney barely had a working relationship with Dr. Kevorkian, whom he had working with him. In addition, Dr. Kevorkian had indicated to Mr. Gorosh that he did not want this other attorney involved with the trial.

16. On Sunday, March 21, 1999 at 10 a.m., Mr. Gorosh and I were to meet with Dr. Kevorkian. I arrived at 10 a.m., met with Dr. Kevorkian and discussed with him the division of trial duties. He stated that I would conduct the examination of him when he testified.

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17. On Sunday, March 21, 1999, at about 10:30 a.m., Mr. Gorosh and the other attorney arrived at the meeting. Immediately, Dr. Kevorkian became distressed that the other attorney, whom he had explicitly instructed Mr. Gorosh not to bring, was present. Until that moment, I was unaware that Dr. Kevorkian had discussed this other attorney with Mr. Gorosh. A one-sided argument ensued wherein Dr. Kevorkian told Mr. Gorosh he did not trust him any more. This argument continued for nearly an hour.

18. Dr. Kevorkian ultimately stated in no uncertain terms to Mr. Gorosh that he would represent himself unless I could represent him at the trial. Mr. Gorosh, however, was adamant that I could not represent him. Mr. Gorosh and I thereafter discussed this issue, and Mr. Gorosh advised me that I could not conduct the trial because he was lead counsel and that it would damage his reputation if I replaced him. I then suggested that I could conduct the substantive aspects of the trial at the beginning stages with the hope that Mr. Gorosh and Dr. Kevorkian would make amends once the trial commenced. Mr. Gorosh would not agree with this proposal because he said it would damage his reputation.

19. Because Mr. Gorosh made it clear that he would not permit me to act as trial counsel, when Dr. Kevorkian again asked me to represent him at trial, I indicated my reservation about conducting the trial solo because terminating Mr. Gorosh would cause a great deal of publicity. In addition, I told Dr. Kevorkian I felt awkward because Mr. Gorosh had asked me to assist as co-counsel. Dr. Kevorkian, knowing that acting as his own lawyer would be detrimental to his case, nevertheless decided he would rather represent himself than

be represented by Mr. Gorosh. Had Mr. Gorosh permitted me to act as lead counsel, Dr. Kevorkian would not have represented himself.

20. I discussed with Mr. Gorosh the breakdown of the attorney-client relationship on our way to court on March 22, 1999. I suggested that he indicate this to Judge Cooper in chambers upon arrival. But Mr. Gorosh refused.

21. At court on March 22, 1999, Judge Cooper called counsel into chambers to discuss preliminary matters. Mr. Gorosh indicated to Judge Cooper that Dr. Kevorkian would be representing himself with us acting as his advisors. Given the import of this news, Judge Cooper questioned Mr. Gorosh. Mr. Gorosh never informed Judge Cooper of Dr. Kevorkian's desire to have me act as lead counsel and to be the person primarily responsible for conducting the trial. Mr. Gorosh appeared to me to be deliberately undermining Dr. Kevorkian to the court, suggesting his incompetence or that he may disrupt the proceedings. I did not believe Mr. Gorosh was acting in the best interests of the client. I left during this conference after briefly stating that there had been a breakdown in the attorney-client relationship.

22. During the pendency of my representation of Dr. Kevorkian, I was appreciative to Mr. Gorosh for the opportunity to be involved with such an intellectually challenging and interesting case. Because of this, at the time it was awkward to be assertive with Mr. Gorosh about our duties to Dr. Kevorkian. However, in retrospect, I realize that I abdicated my responsibilities to the client. I should have

advised Dr. Kevorkian to put his concerns about his representation on the record. I realize my actions deprived Dr. Kevorkian of counsel of choice.

23. Throughout the trial, Mr. Gorosh displayed contempt and ridicule for Dr. Kevorkian. On occasion, he would make comments under his breath, roll his eyes, deeply sigh, put his head in his hands, smirk and seemingly share the Court's discomfort during difficult points. Further, Mr. Gorosh provided very little substantive advice and consultation to Dr. Kevorkian. Mr. Gorosh was seated between Dr. Kevorkian and I which made it nearly impossible for me to communicate with the client.

24. When Dr. Kevorkian asked Mr. Gorosh to assist him with the legal argument and offer of proof regarding calling the Youk's as witnesses, Mr. Gorosh was not prepared with an offer of proof or research in support of calling the Youk's (Melody and Terrence) as witnesses. When the Youk's were added to our witness list subsequent to the Court's ruling on the pretrial motion, I asked Mr. Gorosh about it and he concluded that their testimony was relevant. (In principle, I agreed but we had a court order with which to deal.) During lunch recess, I referred to my emergency resources and prepared an offer of proof and legal argument for Dr. Kevorkian. The afternoon session was adjourned allowing an opportunity to prepare and file a memorandum on the issue. Mr. Gorosh and I did so. I believe the record was adequately protected and preserved.

25. During Dr. Kevorkian's closing argument, Mr. Gorosh made an under-his-breath statement that Dr. Kevorkian overheard, interrupting Dr. Kevorkian's closing. Dr. Kevorkian paused momentarily, then continued.

26. During the prosecutor's closing argument and/or rebuttal argument, I requested Mr. Gorosh to instruct Dr. Kevorkian to object. However, Mr. Gorosh advised Dr. Kevorkian to object on only one occasion. This occurred when the prosecutor compared Dr. Kevorkian's actions to genocide.

27. After closing arguments, I told Dr. Kevorkian and Mr. Gorosh that it was necessary to make a record on the prosecution's reference in closing argument to Dr. Kevorkian's failure to testify. This discussion evolved to the point that I was going to stand alone as an officer of the court and make the record because Mr. Gorosh thought this delayed record would make it appear as if we were incompetent. Fortunately, counsel Mayer Morganroth stopped into the courtroom and persuaded Dr. Kevorkian to make this objection.

Further deponent sayeth not.

s/ Lisa Dwyer
Lisa Dwyer, Esq.

Subscribed and sworn to before me
this 21 day of May, 1999.

s/ Michelene T. Sager
Notary Public

Appendix I

EXHIBIT B

AFFIDAVIT OF MICHAEL ALAN SCHWARTZ

STATE OF MICHIGAN)
)ss.:
COUNTY OF OAKLAND)

MICHAEL ALAN SCHWARTZ, first having been duly sworn, deposes and says:

1. I am an attorney who is a member of the State Bar of Michigan in good standing.

2. Over the past eight (8) years, I have represented Dr. Jack Kevorkian along with my partner, Geoffrey Fieger.

3. While my partner was the Democratic candidate for Governor of Michigan in 1998, Dr. Jack Kevorkian and Dr. Georges Reding were arrested on misdemeanor charges of assaulting a police office and obstructing justice involving an incident at William Beaumont Hospital in Royal Oak, Michigan.

4. I appeared on behalf of Dr. Kevorkian and I assigned David Gorosh to appear on behalf on Dr. Reding in *People v. Reding and Kevorkian*, 44th District Court Case No. 98-54290, 54291, pending before the Hon. Daniel Sawicki.

5. At the time, I knew that Gorosh had had some experience as a public defender but that his trial experience

was extremely limited. To the best of my knowledge, Gorosh had never tried a homicide case and I was unaware of any felony cases which he had tried.

6. Inasmuch as I would have a supervisory role as lead counsel for the defense, I felt comfortable in having Gorosh serve in a capacity in which he would have my continuous personal guidance during the trial.

7. On October 5, 1998, the date set for jury selection, I was taken to the hospital as a result of chest pains which I was suffering. I previously suffered a heart attack in August, 1996 and my left anterior descending coronary artery is completely blocked.

8. On October 5, 1998, while I was in the Coronary Intensive Care Unit at Henry Ford Hospital in Detroit, I received a telephone call from David Gorosh in which he announced his intention to pick a jury.

9. I ordered him not to pick a jury, telling him that inasmuch as I was representing Dr. Kevorkian, it was unacceptable that he pick a jury without my input. It should be noted that at the time, I had over 25 years experience as an attorney, having tried over 40 criminal jury cases to completion, including homicide cases, whereas Gorosh, who was a lawyer for only three (3) years at the time.

10. Gorosh insisted that he was able to pick the jury and declared his intent to do so, irrespective of the fact that, as his supervisor, I had instructed him not to do so.

11. Later in the day, Gorosh came to my hospital bed at the Coronary Intensive Unit at Henry Ford Hospital where I was hooked up to monitoring devices and had an intravenous drip placed in my arm. He pleaded with me to allow him to pick the jury. I reiterated that no jury was to be selected until I was well enough to return to court.

12. It was only when Dr. Kevorkian discharged Gorosh in open court that the jury selection was put off until I returned.

13. Thereafter, Gorosh made some distasteful and reprehensible statements about my partner, Geoffrey Fieger, which were reported by the newspapers.

14. It became obvious to me that when faced with a stituation in which he was required to subordinate his own interests for the benefit of his client, Gorosh was either unwilling or unable to do so.

15. Gorosh then left the employ of Fieger, Fieger & Schwartz, P.C.

16. Thereafter, Dr. Kevorkian was arrested on murder charges in connection with the death of Thomas Youk. Dr. Kevorkian was also charged with assisting in a suicide and delivery of a controlled substance.

17. Dr. Kevorkian determined that he wanted to represent himself at trial and that he wished to have a lawyer who would perform legal work in connection with the case other than examining witnesses.

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18. Gorosh became a self-style legal adviser to Dr. Kevorkian and engaged in certain pre-trial motions.

19. On one occasion, just before the preliminary examination in the 51st District Court, I strongly advised Gorosh not to seek dismissal of the assisted suicide charge, stating to him that the prosecutor had engaged in a *faux pas* by charging both murder and assisting in suicide since the two charges were repugnant of one another. Gorosh dismissed the suggestion.

20. Subsequent to the bindover by the magistrate, I again strongly urged Gorosh not to seek dismissal of the assisted suicide charge. I made it clear that with both charges pending, Dr. Kevorkian would have a much stronger argument that the prosecutor was on a witch hunt, since in order to argue for both charges, the prosecutor would essentially have to claim that Dr. Kevorkian murdered Youk and that Youk then became resurrected only to kill himself and die a second time with the aid of Dr. Kevorkian. Obviously, such a situation would have exposed the prosecution to ridicule or worse and would have been a definite advantage for Dr. Kevorkian. Gorosh, whose experience as a criminal defense trial lawyer was extremely limited, insisted that it was important to have whatever charges dismissed as soon as possible, even it that meant giving up arguments which could otherwise have been made on behalf of his client.

21. My partner, Geoffrey Fieger, who had successfully defended Dr. Kevorkian on a number of assisted suicide cases previously, also strongly advised Gorosh not to seek dismissal of the assisted suicide charge prior to trial.

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22. Gorosh then proceeded to move for the dismissal of the assisted suicide charge, despite having been warned by me on at least two occasions that such a course was unwise and would do damage to Dr. Kevorkian and having been given the same warning my Geoffrey Fieger.

23. It was clear to me that Gorosh was ill-equipped to serve as chief defense counsel in a significant murder case given his lack of experience, his inability to grasp important strategic considerations, and his ultimate failure to consider the best interests of his client.

FURTHER DEPONENT SAITH NOT.

s/ Michael Alan Schwartz
MICHAEL ALAN SCHWARTZ

Sworn to before me this
18th day of May, 1999.

s/ Jill Brandana

Appendix I

EXHIBIT C

STATE OF MICHIGAN

IN THE COURT OF APPEALS

ON APPEAL FROM THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

Court of Appeals Case No.
Lower Court Case No. 1998-163675-FC
Hon. Jessica Cooper

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

vs.

JACK KEVORKIAN

Defendant.

AFFIDAVIT OF RUTH HOLMES, CDE

STATE OF MICHIGAN)
) SS
COUNTY OF OAKLAND)

Ruth Holmes, having first been duly sworn, deposes and says:

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1. I served as a jury consultant on behalf of Defendant, Dr. Jack Kevorkian ("Kevorkian"), in the instant action as well as in connection with prior trials involving Dr. Kevorkian. I am also a handwriting and document examiner, and I am a resident in the County of Oakland, State of Michigan. My roles in such capacities include, without limitation, examining handwriting and body language.

2. I submit this affidavit in support of Defendant, Dr. Kevorkian's Motion for New Trial pursuant to MCR 6.431 on the grounds of ineffective assistance of counsel. I have personal knowledge of the facts and information set forth herein, and I am competent to testify thereto if called as a witness at an evidentiary hearing or otherwise.

3. At the outset of the case, Dr. Kevorkian indicated that he intended to present the defense to the jury, and that David Gorosh, Esq. ("Gorosh") would serve as his lead defense trial counsel in the capacity of an advisor. Dr. Kevorkian also made it clear that he felt comfortable with Lisa Dwyer, Esq. ("Dwyer) serving as co-counsel to Gorosh in an advisory capacity, but that he did not want any other lawyers working on his matter without his express consent.

4. Although Gorosh and Dr. Kevorkian met on occasion to discuss the case and prepare for trial, Gorosh simply assured Dr. Kevorkian that everything was being handled.

5. As time progressed, Dr. Kevorkian agreed to allow Gorosh and Dwyer to present the defense to the jury, however, after a heated exchange just prior to the commencement of the trial, Dr. Kevorkian indicated that he would be presenting

the defense to the jury and Gorosh and Dwyer would serve in an advisory capacity only. The heated exchange involved Gorosh's open defiance of Dr. Kevorkian's instructions that a certain young lawyer could not be on the defense team, could not participate in any aspect of the defense and should not attend defense team meetings. Notwithstanding Dr. Kevorkian's explicit instructions, Gorosh had invited the young lawyer to participate in preparing the defense, had promised the young lawyer that he could sit at counsel table during the trial and brought the young lawyer to a defense team meeting the weekend before trial was scheduled to commence.

6. Inasmuch as Gorosh had also openly defied Dr. Kevorkian's instructions not to file a motion to quash the criminal assistance to suicide count, Dr. Kevorkian stated that he began to feel that he could not trust Gorosh.

7. After Dr. Kevorkian made it clear that Gorosh would not be presenting the defense to the jury, Gorosh's attitude worsened. It appeared as if he was withholding assistance as a legal advisor that he knew Dr. Kevorkian needed and wanted in an effort to cause Dr. Kevorkian to feel so frustrated and helpless that he would turn over the case to him.

8. During the trial, I observed the body language of many of the individuals present in the courtroom, including Gorosh. I was surprised to observe that Gorosh was frequently shaking his head, making hand gestures and remarks about

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Dr. Kevorkian's presentation while Dr. Kevorkian was actually making his presentation to the jury.

9. On several occasions, I cautioned Gorosh to refrain from shaking his head, making hand jestures and making any comments about Dr. Kevorkian's presentation because I was concerned that Gorosh's behavior might have a negative impact on the jury. It was my belief that Gorosh's behavior could have been interpreted by the jury as a lack of confidence in his client, as well as affect Dr. Kevorkian's credibility with the jury.

10. Throughout the trial preparation, it became apparent that Gorosh had become more and more independent, frustrated with and less able to communicate with his client, Dr. Kevorkian. His main focus became the media rather than providing advice and adequate preparation to Dr. Kevorkian. I believe that Gorosh's priorities became confused to the detriment of the client, Dr. Kevorkian.

11. Based upon my observation, Gorosh appeared to be unable or unwilling to give the legal advice during the trial that was necessary for Dr. Kevorkian to adequately present a defense. In fact, I was surprised that Gorosh instructed Dr. Kevorkian to call Mrs. Youk to the stand since he had not provided Dr. Kevorkian with any meaningful assistance or legal arguments to support her being called as a witness.

Further deponent sayeth not.

s/ Ruth Holmes
Ruth Holmes, CDE

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Subscribed and sworn to before me
this 21st day of May, 1999.

s/ [illegible]
Notary P ublic, Michigan, Oakland County
Comm. Expires: 3-20-2003